No. 15579

United States
Court of Appeals
for the Ninth Circuit

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

OREGON FROZEN FOODS COMPANY and ORE-IDA POTATO PRODUCTS, INC.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, for the District of Oregon

File No. 7583

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

OREGON FROZEN FOODS COMPANY and ORE-IDA POTATO PRODUCTS, INCORPORATED,

Defendants.

COMPLAINT

I.

Plaintiff brings this action to enjoin defendants from violating the provisions of Sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; as amended by Act of October 26, 1949, 63 Stat. 910; U.S.C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III.

Defendants are, and at all times hereinafter mentioned were corporations organized under and exist-

ing by virtue of the laws of the State of Oregon, having their principal office, place of business and a manufacturing plant at 789 North East 1st Street in the City of Ontario, State of Oregon, within the jurisdiction of this Court, and are, and at all times hereinafter mentioned were, engaged at that place of business in the production, sale, and distribution of food.

IV.

At all times hereinafter mentioned, defendants employed and are employing as many as 500 employees in and about said place of business in Ontario, Oregon; in the production of food for interstate commerce, within the meaning of the Act. Substantially all of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from said place of business to other states.

V.

Defendant's repeatedly have violated and are violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of their employees engaged in the production of goods for interstate commerce, within the meaning of the Act as aforesaid, for work weeks longer than 40 hours since February 1, 1952, without compensating these employees for their employment in excess of 40 hours, in work weeks during such period, at rates not less that one

and one-half times the regular rate at which they were employed.

VI.

Defendants repeatedly have violated and are violating the provisions of Section 15(a)(1) of the Act in that since February 1, 1952, they have shipped, delivered, transported, offered for transportation, and sold in interstate commerce from said place of business to other states, goods in the production of which many of their employees were employed in violation of Section 7 of the Act as alleged.

VII.

Defendants have, since February 1, 1952, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendants, their officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Sections 15(a)(1) and 15(a)(2) of the Act, and such other and further relief as may be necessary and appropriate.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ JAMES F. SCOTT,
Assistant Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

/s/ C. E. LUCKEY,
United States Attorney.

[Endorsed] Filed July 15, 1954.

United States District Court for the District of Oregon

Civil Action File No. 7583

JAMES P. MITCELL, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

OREGON FROZEN FOODS COMPANY and ORE-IDA POTATO PRODUCTS, INC.,

Defendants.

SEPARATE ANSWER OF OREGON FROZEN FOODS COMPANY, A CORPORATION

Comes now the defendant, Oregon Frozen Foods Company, and for its separate answer to the complaint of the plaintiff, admits, denies and alleges as follows, to wit:

I.

That this defendant for itself only, admits the allegations of Paragraphs I, II and III of said Complaint.

II.

Answering Paragraph IV of said Complaint this defendant admits the allegations thereof except the allegation "defendants employed and are employing as many as 500 employees" and this defendant denies said allegation alleging the fact to be as hereinafter stated and set forth in the further and separate Answer of this defendant.

III.

Answering Paragraphs V, VI and VII of said Complaint except as the allegations thereof are hereinafter specifically admitted, this defendant denies all of the allegations of said paragraphs.

For a first, further and separate Answer and Affirmative Defense, this answering defendant alleges and shows to the Court:

I.

That this defendant is a corporation, organized under the laws of the State of Oregon and has its office and place of business in the City of Ontario, Oregon.

II.

That during all the times mentioned in plaintiff's Complaint, the plaintiff was and now is engaged in purchasing, handling, packing, storing, freezing, preparing in their raw or natural state, or canning agricultural and horticultural commodities for market, in the area where such agricultural and horticultural commodities are produced.

III.

That during all of said operation, all of the employees of this defendant are engaged in said operation aforesaid, and are exempt from the maximum hour provision of the Act by virtue of the provisions of Section 213 (a) (10) U.S.C.A.

For a Second, Further, Separate, Affirmative and Alternative Defense, This Defendant Alleges:

I.

The defendant for the sake of brevity realleges all the matters contained in the first paragraphs of its first, affirmative defense.

II.

That this defendant is engaged in purchasing and processing for market perishable and seasonal agricultural and horticultural commodities within the area of production, during the seasonal period, when said commodities are available and should be so processed in order to save and market the same.

III.

That all of the employees of this defendant mentioned in plaintiff's complaint are engaged in the performance of work necessary to the activities of defendant described in the second paragraph of the separate answer; that the work of such employees is of a seasonal nature and that the provisions of Section 207 (a) U.S.C.A. does not apply to such employees during a period, or periods, of an aggregate of fourteen work weeks in each calendar year.

For a Third, Further, Separate, Affirmative and Alternative Defense, This Defendant Alleges:

I.

That defendant, for the sake of brevity realleges all the matters contained in the first paragraphs of this affirmative defense, and in the second paragraph of its second defense.

II.

That the employees of this defendant in the performance of the work described in the second paragraph of the second defense have not worked in excess of 12 hours in any work day or 56 hours in any work week for a period not more than 14 work weeks in the aggregate in any calendar year and such employees and this defendant are entitled to the partial exemption set out in Section 7 (b) (3) of the Act referred to in plaintiff's complaint.

Wherefore, the defendant prays that this suit be dismissed and that the defendant recover its costs and disbursements herein expended.

/s/ MARTIN P. GALLAGHER,

/s/ P. J. GALLAGHER,

Attorneys for the Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

SEPARATE ANSWER OF ORE-IDA POTATO PRODUCTS, INC., A CORPORATION

Comes now the defendant, Ore-Idaho Potato Products, Inc., and for its separate answer to the complaint of the plaintiff, admits, denies and alleges as follows: to wit:

I.

That this defendant for itself only, admits the allegations of Paragraphs I, II and III of said Complaint.

II.

Answering Paragraph IV of said Complaint this defendant admits the allegations thereof except the allegation "defendants employed and are employing as many as 500 employees" and this defendant denies said allegation alleging the fact to be as hereinafter stated and set forth in the further and separate Answer of this defendant.

III.

Answering Paragraphs V, VI and VII of said Complaint except as the allegations thereof are hereinafter specifically admitted, this defendant denies all of the allegations of said paragraphs.

For a first, further and separate Answer and Affirmative Defense, this answering defendant alleges and shows to the Court:

I.

That this defendant is a corporation, organized under the laws of the State of Oregon and has its

office and place of business in the City of Ontario, Oregon.

II.

That during all the times mentioned in plaintiff's Complaint, the plaintiff was and now is engaged in purchasing, handling, packing, storing, freezing, preparing in their raw or natural state, or canning agricultural and horticultural commodities for market, in the area where such agricultural and horticultural commodities are produced.

III.

That during all of said operation, all of the employees of this defendant are engaged in said operation aforesaid, and are exempt from the maximum hour provision of the Act by virtue of the provisions of Section 213 (a) (10) U.S.C.A.

For a Second, Further, Separate, Affirmative and Alternative Defense, This Defendant Alleges:

I.

The defendant for the sake of brevity realleges all the matters contained in the first paragraphs of its first, affirmative defense.

II.

That this defendant is engaged in purchasing and processing for market perishable and seasonal agricultural and horticultural commodities within the area of production, during the seasonal period, when

said commodities are available and should be so processed in order to save and market the same.

III.

That all of the employees of this defendant mentioned in plaintiff's complaint are engaged in the performance of work necessary to the activities of defendant described in the second paragraph of the separate answer; that the work of such employees is of a seasonal nature and that the provisions of Section 207 (a) U.S.C.A. does not apply to such employees during a period, or periods, of an aggregate of fourteen work weeks in each calender year.

For a Third, Further, Separate, Affirmative and Alternative Defense, This Defendant Alleges:

I.

That defendant, for the sake of brevity realleges all the matters contained in the first paragraphs of this affirmative defense, and in the second paragraph of its second defense.

II.

That the employees of this defendant in the performance of the work described in the second paragraph of the second defense have not worked in excess of 12 hours in any work day or 56 hours in any work week for a period not more than 14 work weeks in the aggregate in any calendar year and such employees and this defendant are entitled to the partial exemption set out in Section 7 (b) (3) of the Act referred to in plaintiff's complaint.

Wherefore, the defendant prays that this suit be dismissed and that the defendant recover its costs and disbursements herein expended.

/s/ MARTIN P. GALLAGHER,

/s/ P. J. GALLAGHER,

Attorneys for the Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

The subject case having come on regularly for a pretrial conference at Portland, Oregon, on March 21, 1955, and having been continued thereafter for discussion between the parties, it is Ordered as follows:

Agreed Facts

I.

Plaintiff brings this action to enjoin defendants from violating the provisions of Sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; as amended by Act of October 26, 1949, 63 Stat. 910; U.S.C. Title 29, Sec. 201 et seq.), hereinafter called the Act.

II.

Defendants Oregon Frozen Foods Company and Ore-Ida Potato Products, Inc. are Oregon corporations located at 789 Northeast First Street, Ontario, Oregon, where Oregon Frozen Foods Company is engaged in freezing corn-on-the-cob, whole kernel corn, diced carrots and mixing frozen mixed vegetables; and where Ore-Ida Potato Products, Inc. is engaged in freezing hash-brown potatoes, French-fried potatoes, French-cut potatoes and shredded potato patties. Substantially all of the goods produced by each of the defendants and their employees have been and are being produced for interstate commerce and have been and are being shipped in interstate commerce to other states.

III.

The building, premises and all machinery and equipment therein are owned by Oregon Industries Company, an Oregon corporation. This company leases approximately one-half of the plant together with the necessary equipment for the handling of corn and carrots to the defendant Oregon Frozen Foods Company. Ore-Ida Potato Products, Inc. leases the other one-half of the building with different types of machinery adapted to processing potatoes. A list of the officers and directors of these three firms and a list of the stockholders of Class A voting stock thereof are attached as Exhibits A and B, respectively. Each defendant has its own general manager who exercises direct supervision of the production operation of the particular de-

fendant. E. M. Burton is the manager of Oregon Frozen Foods Company and Otis H. Williams is manager of Ore-Ida Potato Products, Inc. Mr. F. Nephi Grigg, president of the three firms, has general over-all supervision and management.

The freezing equipment consists of five separate systems of refrigeration units. Each system can be operated separately or in combination. The plant has four freezing tunnels with continuous moving belts and one stationary Amerio system in which vegetables are quick frozen, and two cold storage rooms where the frozen vegetables are stored.

The two tunnels and the Amerio system located in the half of the plant leased by Ore-Ida Potato Products, Inc. are used by such defendant for freezing potatoes. The two tunnels in the half of the plant leased by Oregon Frozen Foods Company are used by such defendant for freezing corn and carrots.

IV.

Ontario, Oregon, had a population of 4,465 according to the 1950 United States Census. All corn and carrots frozen by Oregon Frozen Foods Company during 1953 and 1954 came from farms within 15 airline miles of the establishment. During 1953 and 1954 all of the potatoes frozen by Ore-Ida Potato Products, Inc. came from farms within 15 airline miles of the establishment; except that from March through June of each year, the majority of the potatoes came from farms more than 15 miles from the establishment.

V.

The active corn season during which corn is received at the plant from the growers is from August 1 to October 10 of each year.

A.

The steps in freezing whole kernel corn are:

1. Corn is received from grower in husks, weighed in, and unloaded onto conveyors.

2. Conveyed to huskers where husks and most of silks are removed from ears of corn.

3. To inspection and sorting table where bad ears are removed and ears for frozen corn-on-the-cob are sorted out and trimmed.

4. To blancher for steam blanching where corn is partially cooked. All corn to blancher is on the cob. Corn to be processed as whole kernel corn and corn to be processed as corn-on-the-cob go into separate blanchers and receive different amounts of heat.

5. To cutters where kernels are cut from cob.

6. To silker where remaining silks and cut pieces of cob are removed.

7. To washer where kernels are washed and loose skins washed away. This is also a cooling process.

8. To inspection belt where dark and spoiled kernels are removed.

9. To freezing tunnels where the whole kernel corn is frozen on continuous belts.

10. After being frozen, as much as possible of

the frozen whole kernel corn is placed in consumer size packages and put in cold storage. However, due to the rush during the peak corn season and due to Oregon Frozen Foods Company's limited packaging facilities, only part of each day's corn can be packaged at that time. The excess frozen whole kernel corn is put in large bulk containers and kept in cold storage. After the end of the peak corn season the frozen bulk whole kernel corn is taken from cold storage, sorted over a belt, graded and packaged in consumer size packages. It is then shipped on order after being replaced temporarily in cold storage, or kept in cold storage.

B.

The steps in the freezing of corn-on-the-cob, following step number 3 in paragraph V-A, supra, are as follows:

4. To blancher for steam blanching where corn is partially cooked.

5. To cooler and then placed on trays.

6. To freezing tunnels and frozen on trays in sharp freeze.

7. As much of the frozen corn-on-the-cob as possible is placed in consumer size packages after freezing and put in cold storage. Due to the same conditions outlined in paragraph V-A, step 10, supra, a large quantity of the frozen corn-on-the-cob is placed in large wooden bulk packages and put in cold storage. After the peak corn season is over

these wooden containers are taken from cold storage and the frozen corn-on-the-cob is then sorted, graded, cut to the appropriate size and repackaged in consumer size packages. It is then shipped on order after being replaced temporarily in cold storage, or kept in cold storage to be shipped on orders of purchasers.

VI.

The active carrot season when carrots are received at the plant from growers is from October 15 to about December 1.

The steps in the freezing of carrots are as follows:

1. Carrots with tops previously removed by grower are received from grower, unloaded and weighed in.

2. Conveyed to washers and washed.

3. Sorted—green or bad parts trimmed.

4. Carrots are then peeled mechanically by steam and abrasion.

5. Carrots are then inspected, diced, blanched, cooled, again inspected and broken and discolored pieces removed.

6. To freezing tunnels where the carrots are frozen on a continuous belt.

7. As much of the frozen diced carrots as possible is placed in consumer size packages after freezing and put in cold storage but due to the same conditions outlined in paragraph V-A, step 10, supra, a large quantity of the frozen carrots is

placed in bulk packages and put in cold storage and later used to make mixed frozen vegetables or repackaged as frozen carrots in consumer size packages.

From October into the following January frozen lima beans are purchased by Oregon Frozen Foods Company from Inglis Frozen Foods Company, Modesto, California; frozen string beans are purchased from Alderman Farms, Salem Oregon, and frozen peas are purchased from Umatilla Packing Company, Walla Walla, Washington, which frozen beans and peas are mixed by Oregon Frozen Foods Company with whole kernel corn and diced carrots previously frozen by it and the resultant mixture sold as mixed frozen vegetables. Part of the mixed vegetables is shipped immediately on order after temporary cold storage and part is kept in cold storage—the latter may or may not be sold at time the mixing occurs.

VII.

During the active corn season from August 1 to October 10, Oregon Frozen Foods Company has approximately 300 production employees on its payroll handling corn, and during the period from October 10 to March 1 Oregon Frozen Foods Company has approximately 20 employees on its payroll engaged in sorting, inspecting, grading and packing 90 per cent of the frozen bulk kernel corn and sorting, grading, inspecting, sawing and packing bulk frozen corn-on-the-cob. The remaining 10 per cent of bulk frozen kernel corn and corn-on-the-cob is

packed by said 20 employees during the period from March 1 to August 1.

During the active carrot season from October 15 to December 1, Oregon Frozen Foods Company has approximately 40 production employees on its payroll handling carrots, and during the month of December, Oregon Frozen Foods Company has approximately 20 employees on its payroll engaged in mixing and packing frozen mixed vegetables and packing bulk frozen carrots into consumer size packages.

During the active potato season from about October 1 to May 1, Ore-Ida Potato Products, Inc., has approximately 200 production employees on its payroll handling potatoes.

VIII.

All accounts, payrolls, sales, purchases and other business transactions and records thereof of defendants Oregon Frozen Foods Company and Ore-Ida Potato Products, Inc., are performed by the same office personnel in the same office located at the plant. Such office personnel performs the work of both defendants indiscriminately. Prior to about March, 1954, all office employees were carried on the payroll of Oregon Frozen Foods Company, with the cost prorated to each defendant. Since such time most of the office employees have been switched back and forth between the payrolls of each defendant, with the intent that a particular defendant's office expenses will be in proportion to its produc-

tion activities for a particular week. For example, during the week ending February 6, 1955, when the major production activity in the plant was processing potatoes by Ore-Ida Potato Products, Inc., 13 office employees were carried on the payroll of that defendant and 7 office employees were carried on the payroll of Oregon Frozen Foods Company.

Administrative personnel of both defendants are carried on the payroll of Oregon Frozen Foods Company, with the cost prorated to each defendant.

Seven refrigeration employees are regularly employed during the processing seasons—2 per shift, 3 shifts per day, with one relief man—whose duties are to keep the refrigeration equipment in operation. In addition other maintenance employees, such as boilermen, electrician, mechanics, plumber, etc., are employed. During the processing seasons the refrigeration and maintenance employees are carried on the payroll of the particular defendant doing the processing, even though work is also performed during the same work week for the other defendant—such as supplying cold for cold storage. During non-processing periods, refrigeration employees not layed off are put on maintenance work and the time of the maintenance employees is prorated between each defendant in proportion to the amount devoted to each.

Storage activities are performed by 6 or 7 employees, called the warehouse crew, who unload cartons, cases and other supplies from cars and

place them in the plant, remove frozen vegetables from the freezing tunnels to cold storage, remove frozen vegetables from cold storage to fill orders or to be repacked into consumer size packages or used to make mixed vegetables, return repacked vegetables to cold storage, and load cars for shipment. Bulk frozen whole kernel corn, corn-on-the-cob, and diced carrots removed from cold storage and repackaged into consumer size packages, including frozen mixed vegetables, are returned to cold storage for at least 48 hours to remove heat acquired during repackaging before shipment. During processing seasons the warehouse crew is carried on the payroll of the defendant engaged in processing, even though the crew may perform work for the other defendant during the same work week. During non-processing periods the time of the warehouse crew is prorated between each defendant in proportion to the amount devoted to each.

IX.

During 1952 and through the work week ending February 6, 1955, Oregon Frozen Foods Company claimed the overtime exemptions contained in Sections 7(b)(3) and 7(c) of the Act for the weeks shown on Exhibits C and D.

During 1953, 1954, and through the work week ending February 6, 1955, Ore-Ida Potato Products, Inc., claimed the overtime exemptions contained in Sections 7(b)(3) and 7(c) of the Act for the weeks shown on Exhibits E and F.

The 1952 crop of bulk frozen kernel corn, bulk frozen corn-on-the-cob, bulk frozen carrots, and frozen mixed vegetables was packaged in consumer size packages by Oregon Frozen Foods Company from the week ending October 12, 1952, to February 1, 1953, and the Section 7(b)(3) exemption was claimed by Oregon Frozen Foods Company for such work during the weeks ending November 16 and 23 and December 7, 1952, during which weeks overtime was paid only for hours worked in excess of 12 hours per day or 56 hours per week.

The 1953 crop of bulk frozen kernel corn, bulk frozen corn-on-the-cob, bulk frozen carrots and frozen mixed vegetables was packaged in consumer size packages by Oregon Frozen Foods Company from the week ending October 25, 1953, to August 1, 1954, and the Section 7(c) exemption was claimed by Oregon Frozen Foods Company for such work during the weeks ending November 1, 8, 15 and 22, 1953, during which weeks no overtime compensation was paid for work in excess of 40 hours per week.

The 1954 crop of bulk frozen kernel corn, bulk frozen corn-on-the-cob, bulk frozen carrots; and frozen mixed vegetables was packaged in consumer size packages from the week ending October 3, 1954, through at least the date of this stipulation. As a result of the filing of the subject action on July 15, 1954, no exemptions under Sections 7(b)(3) and 7(c) were claimed by Oregon Frozen Foods Company for employees engaged in such repackag-

ing. However, Oregon Frozen Foods Company will return to its former practice of claiming the exemptions for such repackaging work unless enjoined as a result of this action.

The 1954 corn pack of frozen whole kernel corn and corn-on-the-cob was 5,450,000 pounds, of which 1,513,877 pounds consisted of whole kernel corn and corn-on-the-cob packaged in retail packages at the time of original freezing, while the remainder was whole kernel corn and corn-on-the-cob frozen in bulk and later repackaged.

In 1954 the total amount of frozen mixed vegetables was 1,026,552 pounds, of which 405,105 pounds consisted of frozen beans and peas purchased by Oregon Frozen Foods Company from other producers, and the remainder was frozen whole kernel corn and carrots frozen by Oregon Frozen Foods Company.

Twenty-three per cent of the carrots frozen by Oregon Frozen Foods Company is sold by it as frozen carrots, while the remainder of the carrots goes into the mixed vegetables.

X.

During any work week in which either Oregon Frozen Foods Company or Ore-Ida Potato Products, Inc., claimed the Section 7(b)(3) or the Section 7(c) exemption for its production employees, the exemption was also applied to all the office employees, all the maintenance and refrigeration employees, and the warehouse crew, even though the

other defendant may not have claimed the exemption during such week, but such employees worked indiscriminately for each defendant employer. Such practice has been followed to date and subsequent to the filing of this action.

XI.

During the peak seasons described above it is impossible to place in consumer size packages all of the frozen corn and carrots at the time those items are frozen due to reasons hereinbefore stated. That portion that is not so packaged during the peak season is handled in the following manner: The corn-on-the-cob is placed in pallet bins approximately 64 cubic feet in capacity which are lined with a neoprene sack which is sealed to exclude air. They are taken directly from the freezing tunnel to the cold storage facilities. The whole kernel corn is sacked in neoprene bags in 50-pound cardboard containers and likewise put in cold storage. At the end of the peak of the corn season packaging facilities are sufficient to handle more than the daily run and the pallets and 50-pound containers are brought back out of cold storage and further processing and repackaging are accomplished in this respect. The corn-on-the-cob is graded, defective ears removed and it is all cut to the size of the retail package and then placed in a cellophane sack and packed two dozen to the carton. It is then either shipped to buyer after temporary cold storage or held for sale on future delivery.

The kernel corn is run over a sorting belt, then dropped into hoppers and repacked in retail packages. It is then packed two dozen to the carton, replaced in cold storage to await shipment or shipped directly out after temporary cold storage.

[The bulk frozen corn dehydrates and loses the standard grade as specified by the U. S. Department of Agriculture the longer it is stored. It is therefore important to repack as quickly as possible and also necessary to regrade. (Stricken by order, July 25, 1955, R. D. E.)]

The carrots are packed in neoprene sacks in 50-pound cartons, placed in cold storage and withdrawn and mixed in hoppers in specified proportion to the other four ingredients for the mixed vegetable pack. This likewise is true of bulk frozen kernel corn. After mixing, the frozen mixed vegetables are placed in retail cartons, sealed with a waxed paper and then wrapped with the customer's own overlay.

Each purchaser has his own label printed on the overlay packages and packages are not ready for sale until the product is put in the retail package and wrapped first with a sealing waxed package which is sealed with heat and then wrapped with the customer's own label and packaged in cartons in accordance with the specifications of the particular purchaser.

Plaintiff's Contentions

1. The exemption from the overtime requirements of the Act contained in Section 13(a)(10) is inapplicable to both defendants since the "area of production" requirement is not fulfilled in that (a) Ontario, Oregon, had a population in excess of 2,500, according to the 1950 United States Census, and (b) during March, April, May and June, Ore-Ida Potato Products Inc., obtained the majority of its potatoes from farms more than 15 miles from the establishment. A copy of the definition of "area of production" as used in Section 13(a)(10) is attached as Exhibit G.

2. Section 13(a)(10) does not exempt operations on agricultural or horticultural commodities after any change has been effected in their raw or natural state.

3. The repackaging of bulk frozen whole kernel corn, bulk frozen corn-on-the-cob and bulk frozen diced carrots and the mixing and packaging of mixed frozen vegetables is not exempt as "first processing" within the meaning of Section 7(c) of the Act or the Administrator's finding under Section 7(b)(3), a copy of which is attached as Exhibit H.

4. Office personnel, maintenance and refrigeration employees performing work indiscriminately for both defendants during the same work week are exempt under Sections 7(c) or 7(b)(3) of the Act

only during weeks when both defendants properly claim the exemptions.

5. The cold storage of frozen vegetables is not exempt as part of "first processing" within the meaning of Section 7(c) of the Act or the Administrator's finding under Section 7(b)(3). In the event cold storage operations are held to be so exempt, during work weeks when a warehouse crewman performs work indiscriminately for both defendants, he is exempt only if both defendants properly claim the exemption for such weeks.

6. During non-processing periods when the time of maintenance employees and the warehouse crew is prorated between each defendant in proportion to the amount devoted to each, the total hours worked for each defendant must be added in applying the overtime requirements of the Act and each defendant is jointly and severally liable for any overtime compensation due.

Defendant's Contentions

1. Each of the defendants contend that all of their employees are engaged in handling, packaging, storing and preparing in their raw or natural state, agricultural and horticultural products for market, within the area of production, and, therefore, exempt from the terms of the Fair Labor Standards Act because of the provisions of Section 13(a)(10) of the Act.

That all of the various processes through which the said agricultural commodities pass while in the

possession and control of either of the defendants are necessary to and a part of preparing such commodities for market.

That the definition promulgated by the Secretary of the Department of Labor under the Act of the term "area of production" as used in Section 13(a)(10) is arbitrary, capricious, wrongful, unlawful, and does not take into consideration the economic factors involved in the operations of the defendants.

2. If the court finds that the activities are not exempt under 13(a)(10) then each of the defendants contends that it is entitled to the exemptions contained in Sections 7(b)(3) and 7(c) of the Act.

3. That the work performed by office employees and maintenance personnel, including refrigeration employees, is exempt during any work week when either corporation claims the exemption under 7(b)(3) or 7(c).

4. That first processing as used in the Act includes all work performed by employees of either corporation from the time the product is received, to, and including, the loading of the product on board cars or trucks for shipment to purchasers.

5. That all of the products handled by either of the corporations are in a perishable state while in the possession of either of the defendants.

6. That the exemptions under 7(b)(3) or 7(c) is not lost by reason of the fact that an employee under the exemption also performs work during

the same work week for the non-exempt corporation.

7. That mixing and packaging of mixed vegetables is first processing under the Act. That the maintenance of the cold storage room is incidental to and part of first processing.

8. The work of all office employees and supervisory personnel and maintenance personnel is intimately connected with first processing and, therefore, entitled to the exemption when made for the balance of the personnel.

9. The preparation, freezing, mixing and packaging of carrots with other vegetables is first processing under the Act.

10. The grading, sizing and packaging of whole kernel corn and corn-on-the-cob after the peak of the season is first processing under the Act.

Legal Issues Involved

1. Whether the operations of either of the defendants are exempt from the overtime requirements of the Fair Labor Standards Act because of the provisions of Section 13(a)(10) of the Act.

2. Whether the "area of production," as defined by the Administrator, under Section 13(a)(10) of the Act, is arbitrary, capricious, and unlawful considering the facts and circumstances surrounding the location and producing area in which the defendants operate.

3. Whether the repacking of bulk frozen whole kernel corn, frozen corn-on-the-cob and frozen diced carrots is exempt under Sections 7(b)(3) and 7(c) of the Act.

4. Whether the mixing of frozen lima beans, string beans and peas, obtained from other processors, with bulk frozen whole kernel corn and frozen diced carrots produced by Oregon Frozen Foods Company is exempt under Sections 7(b)(3) or 7(c) of the Act.

5. Whether office personnel, maintenance employees, and refrigeration employees operating the refrigeration equipment and producing cold for cold storage are exempt under Sections 7(b)(3) and 7(c) of the Act during weeks when they work indiscriminately for both defendants but only one defendant claims the 7(b)(3) or 7(c) exemptions.

6. Whether the cold storage of frozen vegetables is exempt under Sections 7(b)(3) or 7(c) of the Act.

7. Whether each defendant is jointly and severally liable for overtime compensation on the basis of all hours worked for each defendant during weeks when the time of maintenance employees and the warehouse crew is prorated between each defendant.

Conclusion

This Pretrial Order has been formulated after a conference between the parties and their respective attorneys. The facts set out as Agreed Facts and

all admissions and the facts contained therein are agreed to between the parties. There are no other issues of fact or law except as embodied in this Order and this Order supersedes the pleadings as to issues of law and fact, but each party reserves the right to present additional facts at the trial. This Order will control the course of the trial and shall not be amended except by consent of the parties and the court or by the court to prevent manifest injustice.

Made and entered in open court this 22nd day of June, 1955.

/s/ GUS J. SOLOMON,
United States District Judge.

/s/ STUART ROTHMAN,
Solicitor.

/s/ KENNETH C. ROBERTSON,
Regional Attorney.

/s/ JAMES F. SCOTT,
Assistant Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

/s/ P. J. GALLAGHER,

/s/ MARTIN P. GALLAGHER,
Counsel for Defendants.

EXHIBIT A

Oregon Industries Co.

Directors:

F. Nephi Grigg
Golden T. Grigg
Otis Williams
Ken Inahara
P. J. Gallagher
Dr. Lester H. Emmett
Ross E. Butler

Officers:

F. Nephi Grigg, President
Ross E. Butler, Vice President
Glenn E. Call, Secretary-Treasurer
Ross E. Butler, General Manager

Oregon Frozen Foods Co.

Directors:

F. Nephi Grigg
Golden T. Grigg
Otis Williams
P. J. Gallagher
Ken Inahara

Officers:

F. Nephi Grigg, President
Golden T. Grigg, Vice President
Glenn E. Call, Secretary-Treasurer
Earl M. Burton, General Manager

Ore-Ida Potato Products, Inc.

Directors:

F. Nephi Grigg
Golden T. Grigg
Otis Williams
E. M. Burton
Wm. Berelson

Officers:

F. Nephi Grigg, President
Otis Williams, Vice President
Glenn E. Call, Secretary-Treasurer
Otis Williams, General Manager

EXHIBIT B

Ore-Ida Potato Products, Inc.

Stockholders:

Oregon Industries Co.
D. B. Berelson & Co.
Harry Fukiagi
Winslow Whiteley
Robert J. Hart
Sam Yamaguchi

Oregon Industries Co.

Major Stockholders:

P. J. Gallagher
Ken Inahara

Otis Williams
F. Nephi Grigg
Golden T. Grigg
Ross E. Butler
Dr. Lester H. Emmett
Dr. Charles Palmer
Dr. Roderic Belknap
Dr. William Weese
LeVor Gardner
Loyn Blacker
Daniel K. Brown
Parker P. Fillmore
Six small stockholders

Oregon Frozen Foods Co.

Stockholders:
Grigg Bros. Produce, Inc.
P. J. Gallagher
Ken Inahara
George Little
Otis Williams
Dr. Lester H. Emmett
Dr. Charles Palmer
Dr. Roderic Belknap
Dr. William Weese
LeVor Gardner
Loyn Blacker
Daniel K. Brown
Parker P. Fillmore
Approximately 200 small stockholders

EXHIBIT C

Weeks During Which
Oregon Frozen Foods Company
Claimed Exemption Under Section 7(b)(3)

1952	1953	1954	1955
6-8	6-21	None	None
6-15	6-28		
6-22	7-5		
6-29	7-12		
7-6	7-19		
7-13	7-26		
10-12	8-2		
10-19	10-11		
10-26	10-18		
11-2	10-25		
11-9			
11-16			
11-23			
12-7			

EXHIBIT D

Weeks During Which
Oregon Frozen Foods Company
Claimed Exemption Under Section 7(c)

1952	1953	1954	1955
7-20	8-9	8-15	None
7-27	8-16	8-22	
8-3	8-23	8-29	
8-10	8-30	9-5	
8-17	9-6	9-12	
8-24	9-13	9-19	
8-31	9-20	9-26	
9-7	9-27		
9-14	10-4		
9-21	11-1		
9-28	11-8		
10-5	11-15		
	11-22		

EXHIBIT E

Weeks During Which
Ore-Ida Potato Products, Inc.
Claimed Exemption Under Section 7(b)(3)

1953	1954	1955
5-3	1-17	1-9
5-10	1-24	1-23
5-17	1-31	1-30
5-24	2-7	2-6
5-31	2-14	
7-19	2-21	
7-26	2-28	
8-16	3-7	
10-11	3-14	
10-18	3-21	
	3-28	
	4-4	
	8-1	
	8-8	

EXHIBIT F

Weeks During Which
Ore-Ida Potato Products, Inc.
Claimed Exemption Under Section 7(c)

1953	1954	1955
10-25	1-3	None
11-1	1-10	
11-8	10-3	
11-15	10-10	
11-22	10-24	
11-29	10-31	
12-6	11-7	
12-13		
12-27		

EXHIBIT G

Regulations Part 536

Definition of

"Area of Production"

* * * as used in Section 7(c) of the Fair Labor Standards Act of 1938, as amended, providing partial exemption from the hours provisions of the Act.

And

* * * as used in Section 13(a)(10) of the Fair Labor Standards Act of 1938, as amended, providing exemptions from the wage and hours provisions of the Act.

Title 29, Chapter V, Code of Federal Regulations

Effective January, 1949

UNITED STATES DEPARTMENT OF LABOR,
MAURICE J. TOBIN,
Secretary.

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS,
WM. R. McCOMB,
Administrator,
Washington, D. C.

[Department of Labor Seal.]

Section 536.1

"Area of Production" as Used in Section 7(c) of the Fair Labor Standards Act.

(a) An employer shall be regarded as engaged in the first processing of any agricultural or horticultural commodity during seasonal operations within the "area of production" within the meaning of Section 7(c) if he is so engaged in an establishment which is located in the open country or in a rural community and in which such first processing is performed on commodities 95 per cent of which come from normal rural sources of supply located not more than the following airline distances from the establishment:

(1) With respect to grain, soybeans, eggs, or tobacco—50 miles;

(2) With respect to any other agricultural or horticultural commodities—20 miles.

(b) For the purposes of this section:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

(i) One airline mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or

(ii) Three airline miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five airline miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 per cent of the agricultural or horticultural commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for 2 work weeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume, or other physical unit of measure, except that dollar value shall be used if different commodi-

ties received in the establishment are customarily measured in physical units that are not comparable.

Section 536.2

"Area of Production" as Used in Section 13(a)(10) of the Fair Labor Standards Act.

(a) An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a)(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 per cent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following airline distances from the establishment:

(i) With respect to the ginning of cotton—10 miles;

(ii) With respect to operations on fresh fruits and vegetables—15 miles;

(iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within,

(i) One airline mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or

(ii) Three airline miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five airline miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 per cent of the commodities are received from normal rural sources of supply shall be the last preceding

calendar month in which operations were carried on for 2 work weeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

Section 536.3

Petition for Amendment of Regulations.

Any interested person or association wishing a revision of the foregoing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties or will make other provisions for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes.

EXHIBIT H

For Release Saturday,
August 24, 1940. R-974

U. S. Department of Labor
Wage and Hour Division
Washington

In the Matter of the Determination That the Handling, Packing, Storing, Preparing in Their Raw or Natural State, First Processing or Canning of Perishable or Seasonal Fresh Fruits or Vegetables Are Industries of a Seasonal Nature Pursuant to Section 7(b)(3) of the Fair Labor Standards Act of 1938, and Part 526, as Amended, of the Regulations Issued Thereunder.

Whereas, application has been made by the Northwest Canners Association, the Agricultural Producers Labor Committee, the Lakeland Highlands Canning Company, the West Virginia Horticultural Society, and sundry other parties, under Section 7(b)(3) of the Fair Labor Standards Act of 1938, and Regulations, Part 526, as amended (Regulations applicable to industries of a seasonal nature), issued by the Administrator thereunder for exemption of the handling, packing, storing, preparing in their raw or natural state, first processing or canning of perishable or seasonal fresh fruits or vegetables from the maximum hour provisions of Section 7(a) of the said Act; and

Whereas, on July 1, 1940, a public hearing on said applications was held in Washington, D. C., before Merle D. Vincent, Presiding Officer, the representative of the Administrator of the Wage and Hour Division, duly authorized to hear and determine whether or not the said industries, or branches thereof, are of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act of 1938, and Part 526 of Regulations issued thereunder (Title V, Chapter 29, Code of Federal Regulations), and

Whereas, following such hearing the Presiding Officer duly made his findings of fact and determined as follows:

1. Perishable or seasonal fresh fruits and vegetables are typically harvested within a period ranging from a few weeks to three or four months.

Fruit and Vegetable Packing Houses

2. Perishable or seasonal fresh fruits and vegetables are packed, handled, and prepared in their raw or natural state in establishments which receive for packing 50 per cent or more of the total annual volume of fresh fruits and vegetables in a period or periods aggregating not more than 14 work weeks.

3. The packing, handling, and preparing in their raw or natural state of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and Part

526, as amended, of the Regulations issued thereunder.

First Processing and Canning Establishments

4. Perishable or seasonal fresh fruits and vegetables are subjected to first processing or are canned in establishments which typically operate during an annually recurring season or seasons of six weeks to six months and cease first processing or canning operations during the remainder of the year, except for such work as repair, maintenance, sales, or clerical work, because the fruits and vegetables are no longer available due to climatic or other natural factors.

5. The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and Part 526, as amended, of the Regulations issued thereunder.

Storage Warehouses

6. Storage warehouses which handle perishable or seasonal fresh fruits and vegetables receive for storing 50 per cent or more of the annual volume of fresh fruits or vegetables stored in a period or periods aggregating not more than 14 work weeks.

7. The storing of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act

and Part 526, as amended, of the Regulations issued thereunder; and

Whereas, said findings and determination were duly filed with the Administrator on July 20, 1940, and have since been on file in his office, Room 5144, Department of Labor Building, Washington, D. C., and available for examination by all interested parties; and

Whereas, on July 24, 1940, the Administrator caused to be published in the Federal Register (5 Fed. Reg. 2649) a notice which stated that pursuant to the provisions of Section 526.7 of the aforesaid Regulations, any person aggrieved by the said determination might, within 15 days after July 24, 1940, file a petition with the Administrator requesting that he review the action of the presiding Officer upon the record of the hearing before the Presiding Officer; and

Whereas, pursuant to the provisions of Section 526.7 of the aforesaid Regulations, the American Federation of Labor, Cannery Workers Union of Southern Alameda County, California, Local No. 20843; Cannery Workers Union of Oakland, California, Local 2905; United Cannery, Agricultural, Packing and Allied Workers of America, and sundry other parties, claiming to be aggrieved by the said determination, have filed petitions with the Administrator requesting that he review the action of the Presiding Officer upon the record of the hearing before the Presiding Officer; and

Whereas, the only material issue presented by the said petitions for review is a legal issue as to whether or not the exemptions provided under Sections 7(b)(3) and 7(c) of the Fair Labor Standards Act were intended to operate concurrently or consecutively with respect to establishments engaged in first processing of, or in canning or packing (including handling and preparing in their raw or natural state), perishable or seasonal fresh fruits or vegetables; and

Whereas, the issue raised by the petitioners has been carefully considered by the Administrator; and

Whereas, it is the position of the Administrator that the exemptions provided in Sections 7(b)(3) and 7(c) may operate consecutively as a matter of law; and

Whereas, no provision is made in Section 7(c) of the Act with respect to the storing of perishable or seasonal fresh fruits or vegetables, and, therefore, no problem of interpretation of Sections 7(b)(3) and 7(c) is raised by the determination of the Presiding Officer in connection with the storing of perishable or seasonal fresh fruits or vegetables; and

Whereas, the aforesaid petitions for review do not present any new or additional facts warranting a review of the Findings and Determinations of the Presiding Officer;

Now, Therefore, pursuant to the provisions of Section 526.7 of the said Regulations, the Petitions

for Review of the Findings and Determination of Merle D. Vincent, Presiding Officer, in the above-entitled matter, are hereby denied and the exemption provided by Section 7(b)(3) of the Fair Labor Standards Act of 1938 will become effective on the date this notice embodying the above-quoted Findings and Determination appears in the Federal Register. The said exemption is applicable only as specified by the aforesaid Findings and Determination.

Signed at Washington, D. C., this 23rd day of August, 1940.

/s/ PHILIP B. FLEMING,
Administrator, Wage and Hour Division, U. S. Department of Labor.

Published in Federal Register, August 24, 1940.

[Endorsed]: Filed June 22, 1955.

[Title of District Court and Cause.]

OPINION

East, Judge.

Plaintiff brings this action to enjoin defendants from violating the provisions of Sections 215(a)(1) and 215(a)(2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; as amended by Act of October 26, 1949, 63 Stat. 910; U.S.C., Title 29, Section 201 et seq.).

Parties

Plaintiff is the Secretary of Labor, United States Department of Labor.

Defendants are the Oregon Frozen Foods Company and Ore-Ida Potato Products, Inc. Both are Oregon corporations located in Ontario, Oregon.

Defendant Oregon Frozen Foods is engaged in freezing corn on the cob, whole kernel corn, diced carrots, and mixing frozen mixed vegetables.

Defendant Ore-Ida Potato Products, Inc., is engaged in freezing hash brown, French fried, French cut and shredded potato patties.

Buildings, premises and all machinery and equipment used by defendants are owned by Oregon Industries Co., an Oregon corporation. Each defendant leases approximately one-half of the premises from Oregon Industries Co. Mr. F. Nephi Grigg is President of the three firms and has general overall supervision and management, although each company has its own officers, directors and general manager. The general manager exercises direct supervision of the production operation of the particular defendant.

Agreed Facts

Substantially all of the goods produced by each of the defendants and their employees are produced for interstate commerce.

Administrative personnel, refrigeration employees and storage employees are paid by defendants, cost either being prorated or paid by particular defendant whose goods are being produced at a particular time.

Ontario, Oregon, has a population of 4,465 persons.

All corn and carrots frozen by Oregon Frozen Foods Co. during the period in question came from farms within 15 airline miles of the establishment.

The active corn season is from August 1st to October 10th each year, a period of approximately 10 weeks.

The active carrot season when carrots are received at the plant from growers is from October 15th to about December 1st each year, a period of approximately 6 weeks.

From October into the following January frozen lima beans, frozen string beans and frozen peas are purchased from other concerns. These products are mixed by Oregon Frozen Foods Co., with the whole kernel corn and diced carrots and the resultant mixture sold as mixed frozen vegetables. Part of the mixed vegetables are shipped immediately on order after temporary cold storage, and part is kept in cold storage.

During their respective seasons both the corn and carrots, when received from the grower, go through a preliminary cleaning and sorting process. Both

products are steam blanched before freezing. The carrots are diced prior to blanching whereas the corn is blanched on the cob.

After being frozen, as much as possible of both corn and carrots is placed in consumer size packages and put in cold storage. At the peak of the season, due to limited packaging facilities, only part of each day's products can be packaged at that time. The excess is put in large bulk containers and kept in cold storage. At the end of the peak season the products are resorted and repackaged in consumer size packages.

The Government concedes that the freezing of potatoes by Ore-Ida Potato Co. is exempt under Section 207(b)(3).

The Government also concedes that the freezing of the corn and carrots and the placing into consumer size packages as part of the freezing process are exempt under Section 207(b)(3).

Contentions

The Government contends that:

1. The repackaging of the bulk frozen corn and carrots after the active season ends, the mixing of the frozen vegetable mix, and the storing of the frozen vegetables are not exempt under Sections 207(b)(3) or 207(c).

2. Section 213(a)(10) is completely inapplicable to the operation of Oregon Frozen Foods Co., and Ore-Ida Potato Products, Inc.

3. During work weeks when the office force, maintenance and refrigeration employees work indiscriminately for both defendants, they are exempt under Sections 207(b)(3) and 207(c) only if the operations of both defendants are exempt for that week.

4. During non-processing periods when the time of the maintenance, refrigeration and warehouse employees is prorated between each defendant, the employees are jointly employed and their total hours worked for each defendant must be added together for overtime purposes.

Defendant contends they are exempt from the terms of the Fair Labor Standards Act because of the provisions of Section 213(a)(10) of the Act. Defendants also assert that if they are not entitled to that exemption then they are entitled to the partial exemption contained in Section 207(c).

The Act

In 1938 Congress enacted what is commonly known as the Fair Labor Standards Act. This Act is also sometimes called the Federal Wage and Hour Law. In addition to limiting the hours of service of employees in interstate industries, the act also establishes a minimum wage for such employees. The over-all statutory purpose was to establish a uniform national policy to all industries, and to fix wages on an industry-wide basis. Many classes of employees are expressly exempted from the operation of the Act.

The sections of the Act pertinent to this action are set forth in part as follows:

Minimum Wages

Section 206(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:

(1) Not less than $1 an hour.

Maximum Hours

Section 207(a). Except as otherwise provided in section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section * * * if such employee is so employed.

(3) For a period or periods of not more than fourteen work weeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature, * * *

(c) * * * and in the case of an employer engaged in the first processing of, or in canning or

packing perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations * * * the provisions of Subsection (2) of this section, during a period or periods of not more than fourteen work weeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

Exemptions

Sections 213(a). The provisions of Sections 206 and 207 of this title shall not apply with respect to * * * (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or * * *

Prohibited Acts

Section 215(a). * * * it shall be unlawful

(1) to transport, offer for transportation, * * * goods in the production of which any employee was employed in violation of Sections 206 or 207 of this title, or * * *

(2) to violate any provision of Section 206 of this title * * *

Issues

Does the Exemption Provided in Section 213(a) (10) Apply to Defendants?

There are two points in sharp dispute on this issue:

1. The Government contends that Section 13(a) (10) is inapplicable because the "area of production" requirement is not met.

2. The Government also contends that blanching and freezing the commodities changes them from their raw and natural state and, therefore, the wording in the exemption, "preparing in their raw or natural state," does not apply to defendant.

As to point one regarding "area of production," Section 213(a)(10) states:

> "* * * any individual employed within the area of production (as defined by the Administrator) * * *"

In the Administrator's definition a plant is within the "area of production" if it is located:

(1) in the open country or in a rural community;

(2) within a specified mileage distance from the source of 95% of its commodities.

"Open country or rural community" is defined as not including "any city, town or urban place of 2,500 or greater population."

If the Administrator's definition is valid the exemption would not apply to defendant.

Defendant contends that the definition is arbitrary and capricious. It is obvious from the history of the act, subsequent decisions and the language in the most recent Supreme Court decision, Mitchell vs. Budd, 76 Su. Ct. 527, decided March 26, 1956, that Congress intended to distinguish industrial areas from agricultural areas. Although it is clear to anyone familiar with the economy and geography of Oregon that Ontario is in the heart of an agricultural center and is not an industrial community, nevertheless the fact remains that the Supreme Court has held in the Mitchell vs. Budd case that the definition is valid:

> "No definition of 'area of production' could produce complete equality, for the variables are too numerous. The Administrator fulfills his role when he makes a reasoned definition. See Gray v. Powell, 314 U. S. 402, 411. On no phase of this problem can we say that the Administrator proceeded capriciously or by the use of inadmissible standards. Experts might disagree over the desirability of one formula rather than another. It is enough for us that the expert stayed within the allowable limits. We think he did here and that the definition of 'area of production' under Sec. 13(a)(10) is a valid one."

In view of this holding directly and without qualification on this point it would appear that there is

no other alternative but to hold that the exemption is not available to defendants in that they have not met the "area of production" requirements of the act.

It is, therefore, not necessary to decide the second contention pertaining to the blanching and freezing.

Is the Exemption Provided in 207(c) Applicable to Defendant?

This section of the Fair Labor Standards Act provides for exemption from its provisions as to overtime pay for an employer engaged "in the first processing of, or canning or packing, perishable or seasonal fresh fruits or vegetables."

The Government contends that the repackaging of bulk frozen whole kernel corn, bulk frozen corn-on-the-cob and bulk frozen diced carrots and the mixing and packaging of mixed frozen vegetables is not exempt as "first processing."

Defendant's right to an exemption by this clause, therefore, rests upon the interpretation and application of the phrase "first processing" as used in Section 207(c). If the repackaging is a secondary process the defendants are violating the act and the injunction prayed for would lie.

There have been numerous cases involving this point. One of the earlier cases involving "first processing" under Section 207(c) was Hendrich v. Di Giorgio Fruit Corp., 49 F. Supp. 573, decided April 7, 1943.

In that case defendant was maker of wine, brandy and grape concentrates. Plaintiff contended that only the crushing of the grapes and fermenting of the juice could be considered "first processing" operations; that distilling brandy and fortifying wine are secondary processing operations, or as "operations that are so closely associated thereto that they cannot be segregated for practical purposes." (Interpretive Bulletin No. 14.)

The court explained the legislative history of the act, showing the intent of Congress to be to protect the farmer by allowing exemptions to industries that deal directly with the farmer. If the exemptions were not allowed a probable result would be lower prices to the farmer. Congress realized that perishable or seasonal fruits or vegetables must be processed when they reach the proper stage and that such stage depends upon natural factors which man cannot control.

The court said:

> "If 'first processing' does not mean the processing that first results in a marketable product, where is the line to be drawn? It is true that the wine or brandy making process may be broken down into component processes or operations, and that they, in turn, may be broken down still further. But the same thing is true of any other process, as, for example, the production of dried and frozen fruits and vegetables, condensed, evaporated and dried

milk, butter, cheese, dried eggs and flour, all of which the administrator has held fall within the exemption. Obviously, first processing does not end at some arbitrarily chosen point in the midst of the wine or brandy making process any more than it ends at such a point in the cheese making process. The stipulated facts show that when the crushing season starts defendant's operations are a continuous processing of the fresh grapes and that cannot be halted at any point prior to completion. To choose one process and say this and no more constitutes first processing would be arbitrary and unwarranted."

In McComb v. Hunt Foods, 167 F. 2d 905, the above case was reviewed along with other connected cases and was affirmed, Circuit Judge Denman dissenting.

In Walling v. California Conserving Co., Inc., 74 F. Supp. 182, affirmed 167 F. 2d 905, the Administrator sought to enjoin defendant from violating Sections 207(b)(3) and 207(c) of the Fair Labor Standard Act. Defendant purchased whole fresh apples of inferior grades and parts of fresh apples consisting of peelings and cores, obtained from other operators who dry the pulp of the apple. ("An operation admittedly included in the first process.") The fresh fruit was deposited in a pit from which it was carried by conveyor belt to a grinder, thence squeezed for juice. The court (Judge James Alger Fee) said:

"If the plain words of the statute be taken, the defendant is not regulated thereby, at least in extracting the juice of the apples. Another result can be arrived at only by rationalization. The only basis for such rationalization is the beneficent purpose of the statute.

"Those who know the facts without the necessity of consulting books upon such subjects, realize the difference between seasonal operations to save perishable orchard products and general manufacturing. The interminable conflict between rural and urban is here reflected. Modern manufacturing has developed a series of conditions upon which the Fair Labor Standards Act has been sustained. But the products wait for no man. These must be harvested and processed to a point where they may be preserved in short periods of time, without fail, or the farmer or grower will lose all the proceeds of a year of husbandry. If the primary processor, such as the defendant here, is compelled to keep a 40-hour week because the operation is otherwise rendered too expensive and as a result operates on that schedule, a proportion of the apple peelings and cores might become a total loss. Such loss would fall squarely upon the producer. * * * another obvious fallacy is the argument that peelings and cores of fresh apples are not 'perishable and seasonal fresh fruits' while the remainder of the fruit falls into that classification. * * * The policy of protection to the growers of 'perish-

able and seasonable fresh fruit' is as much force as that of the protection of the general industrial worker. * * * The hypertechnical reasoning concerning 'exceptions' and 'exemptions' has no place here."

It would seem that because some corn is put in large bulk containers until the end of the peak season and then resorted and repackaged in consumer size packages, such delay would not constitute a new process. It would appear that "first processing" is completed when the products are packaged in consumer size packages even though delayed. (Note 1.) When they are so packaged there is a finished product for market and the first process is

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Note 1. 29 CFR Supp. Dec. 31, 1952, par. 780.51 (b)(1) and (b)(3), quoting from Release R-1892, Secretary of Labor and the Administrator of the Wage and Hour and Public Contracts Division:

(1) * * * "An employer who commences processing operations on a perishable commodity to which the exemption in Section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including by-product operations, which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable."

(3) "* * * For example, where peas are shelled (vined) or green beans are trimmed and cut into pieces in one establishment, and the raw peas or beans sent to another establishment for freezing, the exemption can apply to the freezing operations in the second establishment as well as to the operations in the first establishment."

completed. To hold otherwise would be to place an arbitrary point of "first processing" and would be contrary to the spirit and intent of the Act and subsequent interpretations by the courts. It would seem, therefore, that defendants are entitled to the exemption for overtime provisions as contained in 207(e).

If this is correct it is not necessary to decide whether or not the exemption in 207(b)(3) applies to defendant.

The law seems to be clear that if an employee performs both exempt and non-exempt work during the same work week he is not exempt. Fleming v. Swift & Co., 41 F. Supp. 825; Puerto Rico Tobacco Mkt. Co-op. v. McComb, 181 F. (2d) 697.

During the non-processing periods when the time of the employees is prorated between each defendant, both defendants should be jointly liable for the payment of overtime based on the total hours worked per week for each defendant. It appears that this has been the uniform holdings of the courts on this matter. Mitchell v. Thompson Materials & Construction Co., 27 Labor Cases, Par. 68, 888 CCH; Mid-Continent Pipe Line Co. v. Hargrave, 129 F. (2d) 655.

Counsel for the defendants is requested to submit proposed Findings of fact and Conclusions of Law and Decree in conformity with the foregoing.

Dated: October 2, 1956.

[Endorsed]: Filed October 2, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The subject case came on regularly for trial without a jury on July 25, 1956, at Portland, Oregon. James F. Scott, Assistant Regional Attorney, Office of the Solicitor, United States Department of Labor, San Francisco, California, appeared on behalf of plaintiff and Gallagher and Gallagher, Ontario, Oregon, appeared on behalf of defendants. The Court having considered the evidence, briefs and having rendered its opinion, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Plaintiff instituted this action to enjoin defendants from violating Sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; as amended by Act of October 26, 1949, 63 Stat. 910; U.S.C., Title 29, Sec. 201, et seq.), hereinafter referred to as the Act.

II.

Defendants are Oregon corporations located in the same plant at 789 North East First Street, Ontario, Oregon, which they lease with the equipment from Oregon Industries Company. All three firms are closely affiliated with many common directors,

officers, stockholders, a common office force and a common force of refrigeration, maintenance and warehouse employees.

III.

Oregon Frozen Foods Company freezes corn on the cob, whole kernel corn, diced carrots and mixes frozen mixed vegetables. Ore-Ida Potato Products, Incorporated, freezes various potato products. Substantially all of the goods produced by both defendants and their employees are shipped in interstate commerce. The defendants' employees regularly worked in excess of 40 hours per work week and defendants regularly paid them at straight time only for such excess hours. The defendants did not pay one and one-half times the employees' regular rates of pay within the meaning of Section 7(a) of the Act.

IV.

Ontario, Oregon, has a population of 4,465. All of the corn, carrots and potatoes frozen by defendants comes from within fifteen miles of the plant, except that during March through June the majority of the potatoes frozen by Ore-Ida Potato Products, Incorporated, comes from a greater distance. The frozen vegetable mix constitutes 60.6% of corn and diced carrots frozen by Oregon Frozen Foods Company and 39.4% of frozen lima beans, string beans and peas purchased from other processors located more than fifteen miles from Ontario, Oregon.

V.

The active corn season is from August 1 to October 10 and the active carrot season is from October 15 to December 1. The active potato season is from October 1 to May 1. To the extent that Oregon Frozen Food Company's packaging machinery is capable, the frozen corn and carrots are put in consumer-size packages immediately following freezing and then placed in cold storage. However, due to the rush during the active seasons and Oregon Frozen Food Company's limited packaging facilities, only part of each day's production of frozen corn and carrots can be put into consumer-size packages at that time. The excess frozen corn and carrots is bulk packaged, put in cold storage, and after the end of the active season is repackaged into consumer-size package and then replaced in storage or sold.

VI.

The 1954 crop of frozen corn was repackaged after the active season from October 3, 1954, through at least May 22, 1955; the 1953 crop was repackaged from October 25, 1953, through August 1, 1954; and the 1952 crop was repackaged from October 12, 1952, to February 1, 1953. Bulk frozen carrots are repackaged after the active season during the month of December. From October into January, Oregon Frozen Foods Company mixes frozen mixed vegetables consisting of frozen lima beans, string beans and peas, purchased from other producers and mixed with bulk packaged kernel corn

and diced carrots previously frozen by Oregon Frozen Foods Company.

VII.

The common office force and common force of refrigeration, maintenance and warehouse employees perform work for both defendants indiscriminately during the same work week. The office personnel is switched back and forth between the payrolls of the defendants so that the office expenses are in proportion to each defendant's productive activity for a particular week.

During processing seasons the refrigeration, maintenance and warehouse employees are carried on the payroll of the defendant performing the processing. During nonprocessing periods the time of these employees is prorated between each defendant in proportion to the amount devoted to each.

VIII.

That plaintiff concedes that the freezing of the corn and carrots and the immediate placing into consumer-size packages as a continuation of the freezing operation are exempt under Sec. 207(*c*) of the Act as being "the first processing of perishable or seasonal fresh fruits or vegetables," and the Court finds that due to the rush of harvest it is not practicable nor economically sound to package the entire pack from the harvest into consumer-size packages as required by the defendant's market, and that it is necessary to bulk freeze a per-

of the harvest of the corn and carrots coming into the defendant's plant in the course of the harvest. That the later repackaging after the rush of the harvest into consumer-size packages is a reasonable continuation and a part of "the first processing of perishable or seasonal fresh fruits or vegetables."

Conclusions of Law

I.

The Court has jurisdiction over the parties and the subject matter of this action.

II.

Defendants' employees are engaged in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

III.

The repackaging of bulk frozen corn and carrots after the active season ends, the mixing of frozen vegetable mix and the storing of frozen vegetables are exempt from the overtime requirements under Sec. 207(c) of the Act for 14 weeks per year pursuant to the provisions exempting employees in any place of employment where their employer is engaged in the first processing of perishable or seasonal fresh fruits and vegetables.

IV.

The complete minimum wage and overtime exemption contained in Section 13(a)(10) of the Act

as to any individual employed within the area production (as defined by the Administrator), engaged in handling, packing, storing, and preparing in in their raw or natural state of agricultural or horticultural products for market, is inapplicable. The Administrator has defined "area of production" (Title 29, Chapter V, Code of Federal Regulations, part 536, Section 536.2) to require that the establishment be located in open country or in a rural community (defined as a town under 2,500 population) and that 95% of the commodities come from normal rural sources of supply (defined as 15 miles as to fresh fruits and vegetables). Such definition is valid. Ontario, Oregon, has a population in excess of 2,500.

V.

Office personnel, refrigeration, maintenance and warehouse employees performing work for both defendants during the same work week are exempt under Section 207(e) of the Act only during weeks when both defendants can properly claim the exemption.

VI.

During non-processing periods when the refrigeration, maintenance and warehouse employees perform work for both defendants during the same work week, these employees are jointly employed by both defendants and the total hours worked for both defendants must be counted for purposes of computing overtime compensation.

VII.

That the defendants are entitled to the 14 weeks exemption under Section 207(c) and the further exemption of an additional 14 weeks under Section 207(b)(3).

VIII.

Plaintiff is entitled to judgment in accordance with the foregoing.

Dated, March 15th, 1957.

/s/ WILLIAM G. EAST
U. S. District Judge.

Lodged January 28, 1957.
[Endorsed]: Filed March 15, 1957.

In the United States District Court
for the District of Oregon

Civil No. 7583

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Plaintiff.

vs.

OREGON FROZEN FOODS COMPANY and ORE-IDA POTATO PRODUCTS, INC.,

Defendants.

DECREE

This matter coming on for hearing upon the Motion of the defendants above named for a Decree

based upon the Findings of Fact and Conclusions of Law and said Findings of Fact and Conclusions of Law having been heretofore made and entered and the cause being now ready for Decree and the Court being fully advised in the premises,

It Is Hereby Considered, Adjudged and Decreed:

I.

That the operation of the defendants in processing the agricultural products described in the Findings of Fact are not carried on or performed within the area of production as defined by the Secretary of the Department of Labor, and therefore said defendants are not entitled to the exemptions for overtime prescribed by Section 213(a)(10) of the Fair Labor Standards Act.

II.

That the operation of the defendant, Ore-Ida Potato Products, Inc., in freezing potatoes is exempt under Section 207(b)(3) and Section 207(*c*) of the Fair Labor Standards Act. That the operation of the defendant, Oregon Frozen Foods Company, in freezing and packaging into consumer-size packages, mixing and packaging frozen vegetable mix and storing of frozen vegetables is exempt under the provisions of 207(b)(3) and Sec. 207(c) of the Fair Labor Standards Act.

III.

It is further Ordered that if an employee performs both exempt and non-exempt work during the

same work week such work shall not be exempt from the Act.

IV.

It is further Ordered that when any employee is employed jointly by the defendants during the non-processing period both defendants above named shall be jointly liable for the payment of overtime based upon the total number of hours worked for each defendant during any such work week.

V.

It is further Ordered and Decreed that both defendants are liable for the payment to their employees who are engaged in handling, processing and marketing such agricultural commodities in interstate commerce the present minimum wage of one dollar ($1.00) per hour or such other minimum hourly wage as may be hereafter fixed by law.

Dated, March 15th, 1957.

/s/ WILLIAM G. EAST,
U. S. District Judge.

[Endorsed]: Filed March 15, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that James P. Mitchell, Secretary of Labor, United States Department of

Labor, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from so much of the final judgment entered in this action on March 15, 1957, as holds that the storage, mixing and repackaging of frozen vegetables after the active season are exempt operations under Sections 7(b)(3) and 7(c) of the Fair Labor Standards Act of 1938.

Dated: May 10, 1957.

/s/ STUART ROTHMAN,
Solicitor;

/s/ BESSIE MARGOLIN,
Assistant Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ JAMES F. SCOTT,
Assistant Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed May 13, 1957.

United States District Court,
District of Oregon

Civil No. 7583

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

OREGON FROZEN FOODS COMPANY and ORE-IDA POTATO PRODUCTS, INC.,

Defendants.

Portland, Oregon, July 25, 1955.

Before: Honorable William G. East, District Judge.

Appearances:

JAMES F. SCOTT,
Assistant Regional Attorney,
Appearing in Behalf of Plaintiff;

MARTIN P. GALLAGHER,
Attorney for Defendants.

TRANSCRIPT OF PROCEEDINGS

The Court: The matter of James P. Mitchell, Secretary of Labor, United States Department of Labor, Plaintiff, vs. Oregon Frozen Foods Company and Ore-Ida Potato Products, Incorporated, Defendants.

Mr. Scott: Ready for the Government, your Honor.

Mr. Gallagher: Defendant is ready.

Mr. Scott: Your Honor, we have a pretrial order that is on file at the present time.

The Court: Yes. I have it.

Mr. Scott: I would like to make one statement about the pretrial order, your Honor, and that is the language on Page—Page 10, Lines 28 through 31.

The Court: Page 10, Line 38?

Mr. Scott: 28 through 31, Page 10, the last paragraph on Page 10 at the bottom. The Government moves to strike that language upon the grounds it doesn't accurately reflect what the facts are. It states:

"The bulk frozen corn dehydrates and loses the standard grade as specified by the U. S. Department of Agriculture the longer it is stored. It is, therefore, important to repack as quickly as possible and also necessary to regrade."

Now, that indicates there is a minimum standard grade required by the Department of Agriculture of frozen foods shipped in interstate commerce, which is not the fact, [2*] and since that language indicates to the contrary I would like to move to strike that on that basis. And, also, on the bottom—on the last two lines, "It is, therefore, important to repack as quickly as possible and also necessary to regrade."

Now, in general, that is true. The sooner you get

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

frozen food on the table, why, the better it is. And the actual fact of the matter, though, we have an expert witness here to put on evidence that frozen foods may be stored over a considerable length of time without losing any quality. And we would like to have the facts speak for themselves rather than bring it in a pretrial order.

The Court: What is your position, Mr. Gallagher?

Mr. Gallagher: On this, your Honor, we think the language there is accurate. The implication Counsel draws from it, we don't want to join in that implication, your Honor. We do not mean to imply that there is any standard that is required to meet to ship in interstate commerce.

The Court: Well, suppose——

Mr. Gallagher: If we can now agree upon the language——

The Court: Why don't we just simply disregard it?

Mr. Scott: Then are all four lines stricken, 28 through 31?

The Court: That is correct. [3]

* * *

Mr. Scott: Well, I will make an opening statement.

This is an action under the Fair Labor Standards Act of 1938, which is a Federal wage and hour law. The provision of the statute which is alleged to have been violated in this case is section 15(a)(2), the overtime requirements, and 15(a)(1); that is a ship-

ing requirement which prohibits the shipment in interstate commerce of goods produced without paying proper overtime.

The defendant in this case is engaged in the packing of frozen corn and carrots over at its freezing plant in Ontario, Oregon. At the conclusion of the day's run the defendant is unable to pack all of the corn or carrots that come into the plant that day, due to the seasonal influx. As much of the carrots and corn as possible is packaged following the original freezing, and it is packaged in the consumer-sized packages that are sold in the store.

However, about 77 per cent of the both corn on the cob and kernel corn is packaged in bulk and put in cold storage.

Then, after the active season concludes, which was—which is about October 10th—from about October 10th to the following September about 78 per cent of the corn is taken [4] out of the cold storage and repackaged in consumer-sized packages. Also, the firm obtains frozen peas and frozen beans from other food freezers in Oregon and Washington and also California which they mix with the corn and carrots previously frozen by the defendant and sell it as mixed frozen vegetables.

Now, the defendants have not paid overtime after 40 hours for the repackaging of the corn—I am talking about the Oregon Frozen Foods Company now—has not paid overtime for the repackaging of the bulk frozen kernel corn or corn on the cob, nor for the packaging of and mixing the mixed vege-

tables. The reason they haven't paid the overtime is because they claim that there are three exemptions in the law that are applicable to them. Two of the exemptions are practically in the same language. There is an exemption under Section 7(e) which would be 29 U.S.C.A. 207(e), which exempts the first processing of a perishable or seasonal fresh fruit or vegetable.

Now, under Section 7(b)(3), which would be 29 U.S.C. 207(b)(3), there is an exemption for industry found to be of a seasonal nature by the Administrator of the Wage and Hour Division. Now, the Administrator has found that the first processing of perishable or seasonal fresh fruits and vegetables is of a seasonal nature. So, consequently, under Section 7(e) you have one 14-week exemption for the seasonal [5] fresh fruits and vegetables which is an unlimited exemption under Section 7(b)(3), and you have an official 14 work weeks up to 12 hours a day or 56 hours a week for the first processing of perishable or seasonal fresh fruits and vegetables.

Now, the question under both of those exemptions is what is first processing and what is a perishable or seasonal fresh fruit and vegetable?

Now, the Government contends that a perishable or seasonal fresh fruit and vegetable is the vegetable in its raw and natural state as it comes from the farm, and that first processing is the first change in that raw and natural state. Consequently, it is the Government's contention that when this corn and these carrots are frozen that ends the first processing and that when the frozen corn and the frozen

carrots are placed in cold storage and then taken out several months later, as far as up to the following September; to be repackaged, the repackaging is no longer performed on a fresh vegetable, nor is the repackaging part of the first processing. So, on both of those grounds, we contend that the 7(b)(3) and the 7(c) exemption do not apply. [6]

* * *

The Court: All right, Mr. Gallagher, do you wish to make a statement? [9]

* * *

Now, when we get down to that point of the case I think we can limit our consideration as to what constitutes first process. I think there is no question between us as to the seasonal operation, and I think there is no question between us as to a first process. As I understand the provision, first processing ends at the time of freezing, with some slight modification. It is our position, your Honor, that processing is a continuous operation from beginning to end, to and including the point where we place our product in a consumer's or retail package. That is the end result of the operation. For the purpose of this lawsuit the difference will be whether or not a product that is frozen and put into cold storage and then removed from cold storage and repackaged into consumer's or retail packages——

The Court: May I inquire as to your position in the matter? Now, I believe counsel for the Government contends—used the reference "cold storage."

It is your position that this actually is frozen as distinguished from refrigeration?

Mr. Gallagher: It is. It is frozen.

The Court: Then may I inquire, is there a process of thawing in connection with this putting in the consumers' [10] package?

Mr. Gallagher: No, your Honor.

The Court: Very well. I just wanted to understand your theory.

Mr. Gallagher: It is simply our position the first processing continues until the end result is reached. Another item that will be up for your Honor's consideration is the question of perishability, whether or not this is a perishable item. It is our position that these potatoes and the carrots and the corn are perishable vegetables at all times and do not reach the stage of not being a perishable item. [11]

* * *

F. NEPHI GRIGG

produced as an adverse witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Mr. Grigg, are you—you are the president, aren't you, of the Oregon Frozen Foods Company, Ore-Idaho Potato Products Company, Inc.?

A. Yes, sir.

Q. How long have you held that position?

(Testimony of F. Nephi Grigg.)

A. Oh, not very long. Oregon Frozen Foods was organized in 1950, the potato deal a couple of years later. [13]

* * *

Q. Now, on Page 9 of the pretrial order, Lines 14 through 18, it states that the 1954 corn pack of frozen whole kernel corn and corn on the cob was 5,450,000 pounds, of which 1,513,877 pounds consisted of whole kernel corn and corn on the cob packed in retail packages at the time of the original freezing, while the remainder was whole kernel corn and corn on the cob frozen in bulk and later repackaged. Now, to clarify that statement, doesn't the figure 1,513,877 consist of corn that was packaged during the active season either as part of the original processing or taken out of the bulk and repackaged during the active season and the difference was packaged after the active season ended? Isn't that correct?

A. That's virtually correct, I'd say. Yes.

Q. Now, on Page 11, Lines 1 through 4, it refers to the packaging of carrots in neoprene sacks in 50-pound cartons for purposes of making mixed vegetables. But that also applies, doesn't it, for the purpose of repacking carrots as such?

A. That's right. They were packed in bulk at the time of the initial operation.

Q. Yes. In other words, that bulk packaging in 50-pound cartons in neoprene sacks applies both to the carrots in mixed vegetables and also to carrots as such? A. That's right. [17]

(Testimony of F. Nephi Grigg.)

Q. Now, also on Page 11, Lines 7 through 11, it refers to placing of the customers' overlay on the frozen vegetables. Was an overlay of the customer placed only on——

A. You are speaking of the overwrap that goes around the retail package? We call it the overwrap; you call it overlay.

Q. Was the overwrap of the customer placed only on mixed vegetables, or was the overwrap also placed upon frozen corn?

A. On everything, yes. That's——

Q. On everything?

A. That's the theory to get it into that package as fast as you can.

Q. And does Oregon Frozen Foods Company distribute any frozen foods under their own trade-mark? A. Yes, sir. Yes.

Q. What is the name of that trade-mark?

A. We have a Grigg Brothers label and a Mr. G label.

Q. Mr. Grigg, would you describe to the Court the process by which corn goes on this continuous belt and is frozen?

A. Yes, sir. Do you want the whole process?

Q. No; just state it in a few words so the Court knows what it is.

A. In a few words, the corn is received from the field, the husk is taken off, it goes through a preliminary blanch process which is just enough to inactivate the enzymes or—those are the little bugs that create spoilage in the corn, and they [18]

(Testimony of F. Nephi Grigg.)

are inactivated by a blanching process and then the corn is cut off of the cob and then it flows through the freezing tunnel and is quick frozen. The corn that is kept on the cob is similarly blanched to protect it, to kill the initial enzymes. It is blanched but not cooked, and it goes through the tunnels and is quick frozen on the cob for——

Q. All right. Now, when the diced—and, also, the same thing applies to diced carrots, is that right? A. Yes.

Q. Now, when the diced carrots and the kernel corn go through the freezing process, is there some process by which you keep them in loose form, or are they first frozen in big chunk bulks.

A. We try and freeze what we call I.Q.F., individual quick frozen, it's called, and they are attempted to be kept in their individual kernels or cubes.

Q. When you take your kernel corn and your corn on the cob and your carrots out of the bulk storage to repackage, at that time do you have a pre-existing order for those commodities or not?

A. At the time of the packaging?

Q. At the time they are repackaged.

A. Uh-huh. Well, our attempt is to get them into this retail form as fast as we can regardless of whether we have an order or not. We pack as much of it as we dare to; that is, there [19] is some that is left in its bulk state. We call it a flywheel or hazard amount. If there is no market for it, we

(Testimony of F. Nephi Grigg.)

hesitate to pack it in its retail form because we may not have a sale for it.

Q. Now——

A. But we run the risk in our gamble of trying to preserve this food; we run the risk of it losing character and grade by leaving it in its bulk form. But you have the choice of two evils and you generally choose between the two and do a little bit of both.

Q. When it comes to making decisions between the two evils which you refer to, you do choose the evil keeping it in storage until you get a market for it; is that right?

A. Not necessarily. We have got a lot of corn sitting over there right now in your Grigg Brothers and Mr. G label that—in fact, there is several carloads that we put into those labels for the purpose of preservation form and we haven't got a sale for them yet.

Q. About what percentage of your corn and carrots is packaged on a preexisting order, and what percentage is repackaged for the purpose of replacing in storage?

A. Our theory is to——

Q. No; just tell me the figures.

A. Well, what percentage is sold depends on the year. Well, I forgot your last name. All I can remember is Jim. [20]

Q. Scott.

A. Scott. The last year the way we marked it, we take tentative orders. We take tentative orders.

(Testimony of F. Nephi Grigg.)

We call them tentative orders SP, subject to food price. We try to get all of our food sold before we start processing, but there comes a sad year like it did this year and the folks won't firm up on the price due to the market conditions. We try and get our cost that we have got into it. And they say that corn isn't worth much. And if they don't firm up, after we begin processing—the corn is grown, it's there, and we suppose that it was sold. It was tentatively sold. And, in the final analysis, there was a market crash like this last season all over the United States both in canned corn, frozen corn, any kind of corn, they don't firm up on the price and you sit there holding it. Otherwise, while your corn is designated—now, like this year so we wouldn't get in that position again, why, we cut our plantings, our acreage, in half—less than half—and we wouldn't plant any corn unless the buyer had an order. So we figure on going right through this year in the first instance in getting it right into the buyers' package and not having the same problem. But, now, I forgot what your question was. Ask it again and I can answer it.

Q. What percentage of your corn and carrots is packaged on existing order, and what percentage is packaged to replace [21] in storage?

A. Well, last year there was less than half of it packaged on pre-existing order for the reasons that I have said.

Q. What is the situation this year as to the percentage packaged on a pre-existing order?

(Testimony of F. Nephi Grigg.)

A. We have it all ordered 100 per cent now. When we start processing, we are going to put it all in retail packages. There won't be any hold.

The Court: May I interrupt, please? Was the year 1954 a bad market?

The Witness: A very unusually bad market. There was more money lost on canned and frozen corn than any commodity that's ever been processed in the whole United States. It was a national situation. Now, further than that, the years prior to 1954; in 1953 we packaged everything in a retail package and it was sold and delivered by October 1st. We never had even a kernel in the warehouse. And we hope that's going to be the situation this year. That's our plan and we have our sales commitments to protect. Though it is a perishable item, our job is to package it for those buyers. Our job——

Q. But if the market should return to 1954, then, you would return to the practice, wouldn't you, of packaging in bulk for later sale?

A. If our sales turned out to be not firm sales but buyers' [22] runoff we would either package it in our own label or hold part of it for sale to them. Now, in the case of a smaller pack this year, for instance, why, we could—we wouldn't hesitate now to put it in our own package, because we don't have so much of it.

Q. Do I understand your testimony to be that the Oregon Frozen Food Company does have facilities if the market is right to package all of its

(Testimony of F. Nephi Grigg.)

corn in consumer-size packages as part of the original freezing?

A. No, I didn't say that. It could this year with about a third of the acreage that we had last year, but it isn't possible, generally, on a big production scale, Mr. Scott, like we had last year and the year before. It isn't posible to get all that into a retail package as fast as it comes in from the field. We bring it in and process it in six weeks' time, all of these millions of pounds of corn, and it isn't humanly possible to get all that into a retail package at the same time.

Q. Then is it reasonable that you will be able to get this year's pack into consumer-sized packages during the active season because of a decrease in acreage over last year? A. That's right.

Q. And in subsequent years in which there is a large acreage will your practice be to package in bulk for subsequent packaging later on? [23]

A. That's right. Our plan is to get it all in the retail package as fast as we can. And if it comes through the plant too fast, why, then we bring it back just as fast as we can. And, of course, we don't have sales for it, why, it delays a little longer than that.

Q. Now, I think you said that so far as this year is concerned all of your corn has been sold?

A. That's right.

Q. Is that right? A. Yes.

The Court: May I interrupt, Mr. Scott?

Mr. Scott: Yes.

(Testimony of F. Nephi Grigg.)

The Court: Did I understand you to say that you had an approximate six-weeks harvest period on the corn? A. That's right.

The Court: And your carrot harvest period?

A. Oh, about two weeks.

The Court: And potatoes?

A. Our potato season is six to eight months. Generally about six months.

The Court: Just to make sure that we understand each other, I used the word "corn harvest." That would coincide with your receiving period that you received at your plant? A. That's right.

The Court: Six weeks. [24]

A. See, corn does like it does in your garden corn, gets ripe and you have to harvest it.

The Court: About six weeks. And two weeks for carrots? A. That's right.

The Court: All right. Excuse me for interrupting, Mr. Scott.

The Witness: I might add a comment that in that six-weeks period we have to receive enough corn to do the people that buy this stuff the year around.

The Court: I understand.

Q. (By Mr. Scott): Now, during a season like last season where there was a large corn harvest, at the time that you receive that corn and freeze it in bulk you know that it is going to have to be repackaged, is that right? A. That's right.

Q. Now, during seasons like last year where you had packaging in bulk, would it be impossible to

(Testimony of F. Nephi Grigg.)

package all that as part of the original freezing because of it having to comply with the ultimate buyer specification as to the package he wanted it in?

A. That's pretty well clearly defined before we ever start, the kind of package he wants it in.

Q. But, when you don't have an order at that time that you make the original bulk packaging, you don't know the package that the ultimate buyer wants to put it in, do you? [25]

A. There are cases of that kind, yes. Uh-huh. That's where we get into this choice of the two evils I spoke of awhile ago.

Q. And in those situations you would have to hold the corn in storage not only until you got a buyer but also until the buyer told you how he wanted it packaged, is that right?

A. That's right. The way we determined that last year, we chose up sides and we packed half of that excess corn in our own label and the other half we took a chance on setting there until we sold it to somebody. And in both cases there is some still setting there.

Q. Do you ever hold frozen foods in storage for an increase in the market price?

A. No, we are not of a speculative kind of mind. We couldn't if we wanted to, because the bankers won't let us.

The Court: Is that the third evil?

The Witness: We just got the three so far. There is several more in the industry.

(Testimony of F. Nephi Grigg.)

Q. (By Mr. Scott): Now, of course, even during a year like last year when there is a large corn harvest if you would have had sufficient facilities for packaging it you could have packaged it as part of the original freezing, couldn't you?

A. Yes. It isn't—if you realize the extent of a processing plant and how that corn comes in, it just isn't—these little wrapping machines, you know, cost about $15,000 apiece, [26] and by the time you get two or three of those you have got into another evil. So you just—it isn't possible to take a flow of product of that kind and put it all in retail packages at the time it's being processed.

Q. You say it is or isn't? A. It isn't.

Q. It isn't under present facilities, but you could increase your facilities so you could put it in consumer packages as part of——

A. I think you—if you doubled the plant and had enough machinery, that could be done, yes.

Q. Now, in Paragraph 5 on Page 3 of the Pretrial order it specifies that the active corn season during which corn is received at the plants from a grower is from August 1 to October 10 of each year. Now, after that period of time ends that is after October 10?

A. October 10 is a very extreme situation because we are subject to field frost any time after the middle of September and one of the reasons for the large surplus last year and some the preceding year was the weather was nice longer and that brought more corn in. But we don't depend on that long of a season.

(Testimony of F. Nephi Grigg.)

Q. Well, taking October 10th, the period specified in the pretrial order, after that time there is no processing going on on corn, is there? [27]

A. No.

Q. Now——

A. That's out of—they are still processing as far as we are concerned. We are still trying to get that wrapped up.

Q. But, other than the repackaging, that is the only activity that is being performed; is that true?

A. Yes, on corn.

Q. Now, during this period after October 10, when your only activity is the repackaging, the hours of work that are required to perform that repackaging isn't influenced or governed by the receipt of corn in the plant whatsoever, is it?

A. No. Huh-uh.

Q. What is the governing consideration for the number of hours required to be worked in a repackaging after the corn ends?

A. Oh, we—the governing factor is there to get all of those firm orders into the final state of retail package and get them invoiced so we can keep alive and so——

Q. In other words, fulfilling of the orders on time is the governing factor as to the number of hours required to be worked so far as the repackaging is concerned?

A. Well, we are feverishly working there to get the corn preserved by getting it into that package. We are working [28] under the gun for other pu

(Testimony of F. Nephi Grigg.)

poses, like you say. We have deadlines to meet, and we need to pay the bank loan off. But the biggest reason that we like to get it in there is to—is that we have gone through the plant and you have a certain grade on that corn and we want to get it packaged and invoiced to the buyer while it's still the grade that he has bought.

Q. Now, after the end of the corn season which is specified here to be October 10, does Oregon Frozen Foods Company engage in any operations other than the repackaging, the selling, and the maintenance operation required?

A. Well, it has a carrot deal that comes in about that time.

Q. Well, limiting our consideration——

A. November.

Q. ——to corn, are there any activities in regard to corn after October 10 other than repackaging, selling, and maintenance and repair?

A. That's it. The—they have that—along with taking care of the corn they have the mixed vegetable packing to get under a retail wrap, and the carrots, and then that's it.

Q. And, then, it is specified that the carrot season is from October 15th, to about December 1, and after that season does Ore-Ida—I mean, does Oregon Frozen Foods Company perform any work other than the repackaging of bulk frozen carrots, the packaging of mixed vegetables and sales and [29] repair work? A. That's all.

Q. Now, in Paragraph 7 it specifies that the

(Testimony of F. Nephi Grigg.)

active potato season is from October 1 to May 1. After May 1 and the active season ends does Ore-Ida Potato Products, Inc., perform any other work than sales and maintenance activities?

A. Yes, it does.

Q. What other work does it perform?

A. Oh, it has to get its machinery overhauled and in line for another operation.

Q. Yes. Well, I said it performs sales, maintenance, and repair work, after May 1st; isn't that right? A. Uh-huh.

Q. But that—it doesn't perform any processing after May 1st on the potatoes?

A. Not unless there is some little hangover of the season.

Q. What is the largest size of frozen corn that is sold on the market? A. The largest size?

Q. Yes. A. You mean like on the cob?

Q. No. I mean the largest size length, 20, 25, 50 or what?

A. Oh, they—you take a cob corn bulk sale sometimes goes as high as four dozen and the institutional size of cut corn we classify as a 2½-pound package, there is 12 of those. [30] It is in a 2½-pound package and it has an overwrap on it, also. And that's the kind that the Army and the institutions purchase.

Q. Now, how many cold storage rooms do you have at your plant?

A. Well, there is two divisions—major divisions—there, and then—very large rooms.

(Testimony of F. Nephi Grigg.)

Q. Now, are the bulk frozen vegetables that are to be repackaged and the frozen vegetables already packaged in consumer-sized packages stored in the same or separate cold storage rooms?

A. They are stored in the same room. We have to make lot numbers and piles in those rooms or—you know, they are not divided up into little chambers.

Q. Is there any attempt to store all the bulk frozen vegetables in one storage room and the consumer size in another room, or is there any——.

A. There is some attempts made that way, but it's pretty rough.

Q. Well, what is the purpose of making that attempt?

A. Oh, to facilitate the shipping and keep things generally separated.

Q. About what percentage of the bulk frozen vegetables and the consumer-packaged vegetables are stored separately?

A. Oh, I don't know, Jim. I'd say about 50 per cent separation [31] on them.

Q. But the effort is made to store them separately as much as possible; isn't that right?

A. Yes. It would be like trying to store something separate in this room.

Q. Now, as I understand your testimony, when the diced carrots and the kernel corn is frozen it isn't frozen in chunks but it is frozen in individual kernels or individual pieces; is that right?

A. That's right.

(Testimony of F. Nephi Grigg.)

Q. Now, when the bulk frozen corn——

A. I want to clarify that just one point. It isn't entirely that way, because there is, in your bulk freezing, if it happens to be slightly moist, why, the whole box will stick together, but otherwise, why, we attempt to freeze it in little pieces.

Q. Now, when you repackage the bulk frozen carrots or the bulk frozen kernel corn, is there a thawing process that occurs or not?

A. No, outside of the—you bring it out of the cold room and get it right into the retail package; the theory is not to thaw if you can keep from it.

Q. To what extent does it thaw?

A. Oh, it thaws very little. You have a situation of putting it into a package and then the package is inclined to be a [32] little warmer than the others, so you shove it right back into the cold room as fast as you can.

Q. Now, it's provided in the pretrial order that, after the carrots or the corn is repackaged it then has to go back into the cold room for 48 hours. What is the purpose of that?

A. For the purpose that I just mentioned, to prevent any thawing, because your outside package, it has been sitting outside, it is warmer than the frozen corn, so as you put it in you want to get them back in and get them both froze up.

Q. Now, does a refreezing process occur during that 48-hour period?

A. Well, there is no specified 48-hour period. It's just good policy to get that package back in

(Testimony of F. Nephi Grigg.)

there and get it cold the same as the products so that there won't be any thawing.

Q. But does refreezing occur when the consumer-size package is placed back in the cold room?

A. Oh, I don't know that you'd say a refreezing. We don't aim for it to get thawed out that much. But you do cool your package off to conform to the frozen corn so there won't be any thawing.

Q. Mr. Grigg, will you explain to the Court the process that you use for blanching your corn and your carrots?

A. Yes. It's a long continuous conveyor, goes through a chamber, and there is certain temperatures of steam there and the product flows right through that process of steam heat for [33] blanching.

Q. How hot is the temperature for purposes of blanching?

A. Oh, dear! I think that those various temperatures—those quality guys have to watch that, but I—I think that's 212, ain't it, Dale, for cob corn? 212 degrees on cob corn for about eight minutes.

Q. What would be the temperature on kernel corn and on carrots?

A. I don't know. I could get the information for you if you will let me ask a question of this man back here (indicating).

Mr. Gallagher: He can cover that.

The Witness: He can cover that: I remember the cob corn because that's what I specialize in most.

Q. (By Mr. Scott): Now the last paragraph

(Testimony of F. Nephi Grigg.)

in Paragraph 7 on Page 6 of the pretrial order specifies that during the active season Ore-Ida Potato Products, Inc., has approximately 200 production employees. Now, during the off-season how many employees does Ore-Ida Potato Products have?

A. That would vary, Mr. Scott, according to what we were attempting to do the following season. For instance, at this particular time we have quite a number of employees during the off-season because we are trying to install an additional processing line, and if we weren't doing that we probably wouldn't have hardly any, just enough to maintain and repair [34] what we have.

Q. Well, under ordinary circumstances what would it——

A. I think under ordinary circumstances we would probably have 20.

Mr. Scott: That is all.

Cross-Examination

By Mr. Gallagher:

Q. You spoke of a 48-hour period. Now, you don't mean to imply that the food is out of the cold storage and being repackaged for that long a time, do you?

A. No. Mr. Scott mentioned it. We generally put it back in cold storage and hold it for 48 hours. I don't know where that figure came from, but that's good policy to put it back and hold it a day or a few hours, but there is no particular specified time.

(Testimony of F. Nephi Grigg.)

Q. As I understand it, the purpose of that is to be sure that the container itself is well frozen so there will be no heat coming from that?

A. Yes.

Q. Now, you spoke of blanching. What is the purpose of this blanching that you described here 212 for eight minutes?

A. Well, the purpose of blanching is to inactivate the enzymes that create discoloration in—certain types of deterioration in the product, without cooking the product to [35] the point where it's called a cooked product.

Q. What is there about fresh vegetables that spoil?

A. Well, they tell me that there is a bunch of little bugs in there they call——

Mr. Scott: Your Honor, I don't know whether Mr. Gallagher is now examining Mr. Grigg as an expert or not; but if he is, I think he should qualify him as an expert first.

The Court: Well, I think the witness has explained his position about it.

The Witness: I am not an expert. But the—for instance, a potato, if you peel it and set it out in your sink, in a little while it will turn black. If you blanch that a couple of minutes under a certain amount of steam, why, it will prevent that from turning black, but the blamed potato is still raw. And that's the theory on all vegetables.

Q. (By Mr. Gallagher): Now, in all these products that we have been talking about, carrots, corn, you start out with a raw product?

(Testimony of F. Nephi Grigg.)

A. That's right.

Q. What do you end up with?

A. We end up with a raw product:

Mr. Scott: Your Honor, we object to that.

The Court: That's a conclusion.

Mr. Gallagher: Thank you.

Q. In the frozen food industry what is the ultimate condition [36] that you are trying to get these vegetables to the housewife?

A. Fresh-frozen, raw-frozen. We use that term on our packages. We are—what we are trying to do is to keep them from spoiling but to get them to her in their rawest state possible. So we call it fresh-frozen or raw-frozen.

Q. And with these vegetables, and also peas and other things, is there any difference in the products after it is cooked by the housewife and if she had cooked a fresh vegetable not frozen?

A. Very similar; that's why they like it so well.

Q. Now, you spoke of these cold storage rooms. Could you give the Court an idea of the size in comparison with this room?

A. Each room is 150 feet long and 75 feet wide.

Q. How high?

A. 20-foot clearance under the beam.

Q. And the sorting used there, what is the purpose of that?

A. Sorting that we do in the cold storage?

Q. Yes.

A. We don't do any sorting particularly there. We just try to keep it piled where we can get at it so we can bring it out and repackage it.

(Testimony of F. Neph Grigg.)

Q. That's right.

A. If we were putting up an order for a firm, why, we try and pile it separate so we can ship out of his pile. [37]

Q. Now, during the active corn season is any of this corn taken off the lines and put into cold storage particularly during the day shift and if there is a slack period during the night shift, is that brought back out?

A. Yeah. We fill up every minute's time we can. Say, if something happened in the field so the corn wasn't flowing in at night for processing if there is any spare time at all, why, we bring it back out and we pack it then.

Q. Is there any attempt to make or follow the first-in-first-out? A. Very much so.

Q. And why is that?

A. Well, because there is a certain dehydration goes on if a frozen product is where the air can get at it. And if the first stuff that goes in we like to pack it out first so that it lessens that danger. [38]

* * *

Q. Just as far as customers, not any inspection department, do you have some specification by your customers of an inspection?

A. Well, if I were selling some corn today that was packed last September or October I couldn't sell it as the grade at the time that it was processed. I would have to furnish a grade now at the time of repackaging it and shipment.

Q. If you had an inspection of this bulk corn

(Testimony of F. Nephi Grigg.)

going into cold storage that was inspection made as it came off the line, would that have any value on a sale today? [39]

A. Yes. It would have to be inspected today.

Q. And as you bring this corn out tell the Court what you do relative to inspection and rating and sizing and cutting, or whatever else you do. Take the first instance, your cob corn.

A. Well, we would bring our cob corn out and stick it in the repackage line and the inspector would have to pull samples every few minutes of the corn and give the buyer a comprehensive picture of the grade of that corn as it went into the retail package.

Q. Well, now, what, if anything, is done before corn goes into the retail package; that is, corn that you have pulled out of the cold storage?

A. Well, there is a group of ladies—we call it a line—and the line ladies stand there and throw out the stuff that is dehydrated or deteriorated and they pick it out and throw it away and let the good quality corn, they make the grade that it has to by throwing away the deteriorated corn.

Q. Is it necessary to cut into that cob to size for a retail package at that stage?

A. Well, to cut it to size?

Q. Or to pick the sizes out?

A. Not particularly.

Mr. Scott: Well, may I say, your Honor, that it is specified in the pretrial order—— [40]

The Court: What page?

(Testimony of F. Nephi Grigg.)

Mr. Scott: ——Page 10, beginning with Line 20, that it is cut to size.

The Witness: Well, the only deal there would be if somebody ordered a different size than what we had in there. We have packed cob corn just the other day, couple of carloads that we didn't have to cut to size. But if we had—we have two or three varieties of corn in there. If someone had an occasion to use any shorter size than we figured when we put it in, why, we would cut it to size.

The Court: I think that tends to explain it.

Q. (By Mr. Gallagher): And, as is set forth in the pretrial order, this is packed in two cobs to the cellophane bag and shipped out? A. Yes.

Q. You spoke there of looking for dehydration. Can you tell the Court how the ladies on the line determine whether there has been any dehydration there? Is it apparent?

A. Yes. If you were to buy a package of two cobs of corn and you saw on one side of it some lighter kernels, that would indicate it was dehydrated.

Q. And is it necessary to run all of the cobs through this line to determine that?

A. We inspect them all as they come through, yes.

Q. Are you sure, Mr. Grigg, that you package bulk frozen [41] carrots back into retail-size carrots or does the retail-size carrot all come off the frozen line?

A. Well, at this point we haven't a lot of occasion for a retail-size carrot. Any order that we

(Testimony of F. Nephi Grigg.)

had would be taken care of at the time. Mostly the carrots are used institutional sizes, which is a 2½-pound package, or of that nature.

Q. And do you use the frozen bulk carrot for that? A. That's right.

Q. I see.

A. Also, predominantly the frozen bulk carrots go into there and back into your mix like Mr. Scott asked me.

Q. Tell the Court what vegetables go into the mix. A. Pardon me?

Q. What vegetables go into the mix?

A. Oh, there is a five-vegetable mix that is most popular. It has corn, carrots, baby lima beans, string beans, peas.

Q. And of those the corn, the carrots——

A. That's right.

Q. ——and the other items are bought in a frozen state? A. (Witness nods head.) [42]

* * *

Q. (By Mr. Gallagher): Can you describe to us as best you can the condition of that carrot at the time it goes into the retail pack?

A. Yes. It is cubed up and given a pre-blanch for the purpose of inactivating the enzymes in that, and then it is frozen—quick-frozen, and that carrot is a pre-blanched [46] frozen carrot, raw.

Q. And what is necessary to do that to that carrot by the housewife?

A. You have to take it home and cook it to eat and serve it.

(Testimony of F. Nephi Grigg.)

Q. Now, as to the corn on the cob, you described that rather fully, I think. What happens to the corn on the cob by the housewife?

A. They take that home and cook it till it's done.

* * *

Q. Now, on the question of repackaging, what is the ideal situation as far as getting a product into a retail package?

A. The ideal situation is to have it come in from the field on about the same flow as you would repackage it in the tailend room. But, due to quirks of Nature—you understand, sometimes a cool spell and—will hold all of this corn in the field and all at once it will turn hot and you will have hundreds of acres come on you all at once from the field, [47] and the grower has to bring that in or the crop is lost. So you bring it in and start your program and you initially jerk it off of the cob and get it temporarily preserved; that's the thing. Otherwise, it would be nice if you could flow right through and put it right in the retail package.

Q. And do you anticipate that you will be able to do that this season?

A. There is one other reason there, too, your economy of things. If you just brought the corn in even—you couldn't get it all in. You have to plant—your processing capacity in a plant is always generally greater than your packaging capacity, so you bring in a large influx of product and during the harvest season, and then you work it through as fast as you can.

(Testimony of F. Nephi Grigg.)

Q. And do you plant corn in accordance with that schedule so as to make it an even distribution throughout the growing season?

A. That's right.

Q. And do you contract with the growers with that in mind? A. That's right.

Q. And Counsel asked you if you could double the capacity in the plant and take care of all this in one continuous operation. Is that a theoretical possibility, or is it a practical possibility?

A. It is not practical. If you had enough package machines [48] and enough plant, naturally you could package it all as it was processed, but it's not practical.

Q. Do you have a variable factor in there on the weather?

A. Yes. I would call last year—about the time we got in our peak, why, the—it rained for a couple of days and you couldn't even get in the field. Sometimes it rains for more than that. And, then, that corn is stacking up on you and when you can get in the fields you go twice as fast. You got corn all over the place.

Q. When did this market soften up in '54?

A. The market did not—deteriorated right from the beginning of the contract.

Q. But that was after the time you had your corn contracted? A. (Witness nods head.)

Q. How many acres did you contract in '54?

A. Oh, we had—in '54 we had 3,500 acres of sweet corn.

(Testimony of F. Nephi Grigg.)

Q. And how many do you have in '55?

A. We have a thousand acres this year.

Q. Less than a third? You said 4,500?

A. 3,500.

Q. As against a thousand. Can you tell us in more detail what the overwrap is, or the overlay?

A. The overwrap is a moisture-proof wax paper that is wrapped around frozen food cartons and heat-sealed with an automatic wrapper so that it preserves it from the air getting into it. [49]

Q. Is it airtight?

A. Uh-huh.

Q. Now, are there certain standard grades specified by the United States Department of Agriculture for these products?

A. Yes. We have fancy grade which is No. 1; we have Grade B which is No. 2; Grade C which is No. 3, and then we have standard which is No. 4 and that is—they don't—they call is substandard and they don't give any grade.

Q. And you can ship in interstate commerce any grade you want to or no grade at all; there is no necessity of grading as far as——

A. I haven't heard of any as far as interstate commerce is concerned. It is just what the buyer specifies.

Q. So the question of grading is a trade proposition? A. (Witness nods head.) [50]

* * *

(Testimony of F. Nephi Grigg.)

Redirect Examination

By Mr. Scott:

Q. Mr. Grigg, you said that when the corn on the cob is repackaged it is sometimes cut to size. What percentage of the repackaged corn on the cob has to be cut to size and what is not cut to size?

A. There is a possibility of it needing some trimming, depending on some buyer's quirk, if he wanted a different size. But practically all of it is not cut. It is just repackaged.

Q. Well, in order to clear up the pretrial order here, then, on Lines 20 and 21 of Page 10, it states that the corn on the cob is graded, defective ears removed, and it is all cut to size of the retail package.

A. Well, I don't know whether I should say cut to size there or—we have a way we can vary—for instance, in our cellophane bag, it doesn't matter if the corn is just slightly a little longer, but some of the buyers, for instance, back East, they—the corn doesn't grow as long as it does out West, and the retail package may have cobs that are five inches long or five and a half inches. Well, if we pick up a buyer like that, [51] our standard package is a five and a half to six inches in a carton and if we put it in a bag it doesn't matter because we have got some leeway; but if someone come along and had to have a five-inch ear of corn to fit his carton that he already has, well, then we would have to trim to size. On the other hand, in our rush we left some of the corn go through in its long and natural state without hav-

(Testimony of F. Nephi Grigg)

ing trimmed it at all. And, in an isolated instance or two, why, we may have to cut that off. But we don't have any problem that way. The majority of it, all it has to do is go into a bag or carton.

Q. During the original freezing process is that when the corn is generally cut to size?

A. Yes. It goes through—just prior to the going through the blanch it goes through a couple of saws like this (witness demonstrates) that moves through and whacks off to size.

Q. Now, I think you said on your cross-examination that when you had this seasonal influx of corn and carrots into your plant beyond your packaging capacity that your immediate problem is to temporarily preserve those products. Isn't that what you said? A. Yes. Uh-huh.

Q. Now, it is stipulated in the pretrial order in Paragraph 7 on Page 6 that the active corn season is from August 1 to October 10, and then it is stipulated that the repackaging [52] occurs up through the following August 1. How long can that corn or carrots be kept in this bulk frozen condition and still be packaged as a fancy quality?

A. Oh, there is varying times in the frozen food industry. They—it's generally conceded that you have to clean each year and if you carry a product into an ensuing year, why, they won't buy it as a fancy.

Q. Yes. But, as far as the following August 1st is concerned of the previous year's crop, that can still be repackaged in consumer-sized packages as fancy quality, isn't that right?

(Testimony of F. Nephi Grigg.)

A. It may or may not be in some cases. You take a pile of corn, you might get a large percentage of fancy out of it depending on how it's deteriorated in storage.

Q. Now, doesn't a great deal of the deterioration in storage depend upon the proper packing and the proper storage of the bulk frozen commodity?

A. Well, the proper storage—any frozen stuff has got to be kept at zero.

Q. Yes.

A. And the proper packaging is—the better it is taken care of, why, the better it lasts, yes.

Q. Yes. Now, if frozen vegetables are properly packaged and properly stored, can't they be kept in storage in a bulk form for ten or eleven months and still be of a fancy quality? [53]

A. Oh, I think that's happened in many cases; in many cases it hasn't.

Q. Well, what would be the ordinary situation of whether or not it would still be of a fancy quality?

A. Well, if the action—the action of the air in a cold room freezes and dehydrates. Dehydration is your biggest danger in that and you can freeze your shirt dry out on a line.

Q. Let me ask you this: If you have an air-tight package, then humidity in the air outside of the package will not affect the dehydration inside the package, will it? A. Not as fast, no.

Q. If it is completely airtight? it wouldn't affect it at all, would it?

A. Oh, I think there is always a little stuff going

(Testimony of F. Nephi Grigg.)

on, but that's the idea, yes. You airtight it so that it doesn't deteriorate. But in a bulk form you don't and can't, and it isn't feasible to put it in airtight packages, because it is too expensive and you would have to repack it.

Q. Well, it is also provided in the pretrail order that 90 per cent of the bulk frozen corn is repackaged from October 10 to March 1.

A. The stuff that goes into storage.

Q. Yes. That 90 per cent of the stored bulk corn is repackaged from October 10 to March 1. Now, what percentage [54] of that 90 per cent will be repackaged at a fancy quality?

A. You mean the percentage that goes in there fancy, how much comes out fancy?

Q. Yes.

A. Oh, I don't know. I'd say the majority of it would be fancy.

Q. Well, now, "majority"—what do you mean, 50 per cent? A. Past 50 per cent.

Q. Well, what would the percentage be so far as quality is concerned?

A. Well, if you lose a grade on it, you would get the Grade B.

Q. Well, do you actually lose a grade on it?

A. Oh, sometimes. In many cases you do. You have the danger of losing the grade.

Q. I know that you have the danger of losing the grade, but do you actually under storage and proper packaging lose a grade?

(Testimony of F. Nephi Grigg.)

A. We haven't lost a lot, as I remember, from that. That is why we want to get it done faster.

Q. Well, how much have you actually lost?

A. Well, I don't know.

Q. I take it that you do properly pack and properly store your corn and carrots in bulk?

A. Well, there is a certain bulk storage program that you go through, and I guess we are about the best at it. [55]

Q. I take it that you use the best means and best material available for your bulk packaging, don't you? A. That's right.

Q. Now, then, by—and I take it that the method that you use for your bulk storage is a proper method?

A. Well, now, on our cob corn we invented a new way that nobody else has ever accepted yet.

Q. I presume this new way is better than the other way, is that right?

A. We presumed it was, too, but you put it in a big pallet bin and I guess it's a little worse on dehydration there than some of the other ways.

Q. All right. Now, then, let me ask you the question again: Actually—not theoretically, but actually—of this 90 per cent of corn that is repackaged from October 10 to March 1, actually what percentage of that loses its grade from the fancy grade that it originally went in as?

A. Well, I don't know. I'd guess about 20 per cent.

Q. Now, are all of your carrots and all of your

(Testimony of F. Nephi Grigg.)

frozen mixed vegetables sold under your trade label, or are they sold under your buyers' trade label with an overwrap on it?

A. The mixed vegetables?

Q. Yes, the mixed vegetables and the carrots, are they sold under the purchasers' brand name or under your brand name?

A. We call it the buyers' label. It is sold under buyers' [56] label.

Q. You don't sell any of the mixed vegetables or the carrots under your own trade name?

A. Well, all that we do, some institutional—excuse me—all of the mixed vegetables is under buyers' label or overwrap, and most of the carrots. And we do some of the carrots in our own institutional 2½-pound package.

Q. Now, what is your trade name when you sell the institutional carrots?

A. Grigg Brothers.

Q. Grigg Brothers. Now, what percentage of your carrots are sold on a pre-existing order when you put them in the bulk storage?

A. Oh, 95 per cent.

Q. Also, at the time that they are put in the bulk storage have you been notified of the type of overwrap that is to be put on the carrots and the mixed vegetables?

A. Yes. Your order so states that.

Mr. Scott: I believe that is all, your Honor.

The Court: Any further questions, Mr. Gallagher?

Mr. Gallagher: I think not, your Honor.

The Court: That is all, sir. Thank you. You may step down.

(Witness excused.) [57]

Mr. Scott: I would like to call Professor Thomas Ornsdorff, please.

THOMAS ORNSDORFF

produced as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Scott:

Q. Would you state your full name and your address, sir?

A. Thomas Ornsdorff, Food Technology Department, Oregon State College.

Q. Would you state the education that you have had beginning with your college education, please?

A. Bachelor's degree, Oregon State, in General Agriculture, and a Master's degree at University of Massachusetts in Food Technology.

Q. Would you state your experience in teaching regarding food technology and in practical experience that you have had in the business world concerning food technology?

A. Yes. I have taught classes since 1930, about, in various subjects; in shifts from one term to another.

Q. And, also, the name of the school where you taught.

(Testimony of Thomas Ornsdorff.)

A. At Oregon State College, including two years at various times in frozen foods, some for beginners and some for our own [58] technical students. From a practical experience standpoint it has been mostly applied to locker operations which I have designed some and had an interest in some, put on a number of short courses at conventions, and so forth, in Seattle, Portland, Corvallis. And in 1949 and '50, I was Director of the Midwest Frozen Food Council which was—five companies that canned and froze in Central Michigan. We had about all the products that you could conceive there. That was technical and advisory design work. And then there have been other times in which there is consulting work. Currently or recently on a job in Seattle—that was not fruits and vegetables but frozen foods. There has always been a certain amount of correspondence questions and things that are just associated with the experiment station that we are always in on.

Q. Have you had any experience in Government service regarding food technology?

A. Only, I think, as would be associated with the experiment station at the College: part of that is Government. And my travels and these things to national conventions, the Bellesville Experiment Station, the Canners and National Frozen Food Association, and things like that, but not directly employed by the Government.

Q. Have you ever written any publications regarding food technology or the freezing of foods?

(Testimony of Thomas Ornsdorff.)

A. Oh, as related to locker storage and home freezing. [59]

Q. Would you name or identify some of the articles that you have written in that regard?

A. Just the bulletins for home freezing—and I have forgotten the numbers—and locker freezers.

Q. Are those bulletins published by Oregon State College? A. Yes, sir.

Q. At the present time have you received an appointment to the University of Hawaii as a food technologist? A. Just a couple of days ago.

Q. What was that appointment? Would you describe it, please?

A. I am to be visiting food technologist at the University of Hawaii for the Economic and Planning Commission. Their funds will be largely fruit products, canned and frozen—largely frozen.

Q. And I think you said, didn't you, that you have been teaching at Oregon State College—since when?

A. I have been on the staff since '24, and I have been teaching since, I think I said, '30, but it's '28, I believe.

Mr. Scott: We offer Professor Ornsdorff as an expert witness on food technology, your Honor.

The Court: Any questions?

Mr. Gallagher: We acknowledge his requirements; he is an expert on the subject.

The Court: Very well. Accepted as an expert on the subject. [60]

Q. (By Mr. Scott): Professor Ornsdorff

(Testimony of Thomas Ornsdorff.)

are the main methods of preserving fresh food for out-of-season use?

A. You mean as fresh or any method of preserving?

Q. Any method of preserving fresh food for out-of-season use. What are the main methods used?

A. There are various ways of classifying them, but commonly we think of refrigeration—Which may or may not be frozen—canning, drying, salting, smoking, or sometimes those are combined with others or separately as a chemical like sulphur dioxide, benzoate soda; that includes most of them. There is a little flurry now of cold radiation, but that's a little in the future.

Q. Is pickling also——

A. Yes; pickling such as wines, sauerkrauts, cottage cheese.

Q. And freezing is also one of the methods of preserving?

A. Cold either above or below freezing, both.

Q. Now, what is the main consideration in preserving food for out-of-season use, or what is the main cause of food spoilage?

A. Well, the most common causes of food spoilage are micro-organisms of one type or another, yeast molds or bacteria or other causes less noticeable and less offensive, drying out or change of color, flavor, texture even change of texture or more flavor commonly associated with enzymes that affect them.

Q. Now, is the problem of micro-organisms a problem that is [61] common with these various

(Testimony of Thomas Ornsdorff.)

methods you have stated of preserving food for out-of-season use?

A. It is common to all of these methods. In other words, if there is not enough fermentation or alcohol content or acetic acid content, it will spoil by bacteria means. It would be applicable to all of them if they were incorrectly carried out.

Q. Yes. Now, taking, for example, the process of preserving food by canning, how is the microbial growth or—of micro-organisms controlled in the canning process?

A. In that case it is usually sealed in a container and sufficient heat to kill applied to kill the organisms that are apt to spoil that particular product. If it were meat or vegetables, it would take much more heat because it is less acid than fruits.

Q. Yes. A. That's about the size of it.

Q. Well, now, as a result of that application of heat in the hermetically sealing in the canning process, is the product rendered sterile?

A. Usually sterile sometimes is acceptable—we say commercially sterile for all practical purposes.

Q. Yes. Now, taking the—I don't know: did you mention drying as a method of——

A. Yes. [62]

Q. ——dehydration? Now, taking the process of drying as a method of preserving food for out-of-season use, how is the growth of micro-organisms controlled in that process?

A. Because the moisture is so low depending on the product; that is, apples might be 20, 24 per cent

(Testimony of Thomas Ornsdorff.)

moisture, and some vegetables might—might have to be so low as 5. It is so low that they just can't grow.

Q. Now, getting down to the process of freezing, how does the process of freezing check the microbial growth and micro-organisms in the raw vegetable?

A. Micro-organisms grow usually each at a temperature that is optimum for them and some of those are even possible at less than freezing. But in the neighborhood of 20 Fahrenheit all micro-organism growth ceases.

Q. Now, in the preserving of food by freezing is the food rendered sterile or not?

A. No. Commonly the blanch may reduce the number of organisms that are living, but it will not be sterile.

Q. It is not sterile such as hermetically sealing renders the commodity sterile, is that right?

A. That's right.

Q. Now, if a vegetable such as kernel corn or corn on the cob or diced carrots is properly frozen and properly stored and properly packaged, how long may that remain in storage without losing grade? [63]

A. That will depend entirely on what the item is. If it were berries in syrup where they would—and, sealed, it might last for several years. But if it were an item like crabmeat which has spacing between and it is dehydrated into those spaces or that moisture moved about in the container, it might be considered a poorer quality or grade in a

(Testimony of Thomas Ornsdorff.)

matter of months. So it is related to the item that you are talking about.

Q. Yes. Now, as I understand the problem of preserving the food that has been frozen, it is to prevent dehydration during the storage period, is that right?

A. To prevent any form of spoilage like change of color, flavor, increase of bacteria, change of anything including dehydration.

Q. Yes. Now, of these various methods that you have stated that are used to preserve food for off-season use do any of those methods including freezing preserve the commodity in the raw and natural state as it was when it was originally harvested?

A. That's a matter of opinion. For instance, some things dried will be more nearly like natural when they are recooked than had they been processed by some other method. But, commonly, it is believed that freezing is the most natural.

Q. Yes. Now, although—granting that freezing is the most natural, are there certain changes that occur in the raw and [64] natural state of the vegetable even by the freezing process?

A. Oh, yes, indeed.

Q. So would you say that even the freezing process results in some change of a vegetable from the raw and natural state in which it was harvested?

A. Yes, some; it may not be appreciable or of any significance to some housewives.

Q. Yes. Now, besides the micro-organisms that are naturally present in vegetables, is also the action

(Testimony of Thomas Ornsdorff.)

of yeast molds a factor that has to be controlled to preserve it for off-season use?

A. Frozen food, you mean?

Q. Any food. In other words, besides bacteria is there also the question of preventing yeast and molds forming?

A. Oh, yes. They just grow at a different moisture level or a different acidity situation. If it were berries, you would find that it would be yeast and mold; if it were meat, it would be mostly bacteria.

Q. Now, a commodity such as corn, either corn on the cob or kernel corn, and carrots, what is the element that is mostly involved, yeast mold or bacteria, that has to be controlled?

A. In a frozen state, you mean?

Q. Well, in any. I mean, what is the cause of deterioration or spoilage of corn or carrots that has to be controlled to preserve it for off-season use? [65]

A. Well, if it were——

Q. Is it bacteria, the yeast or mold, or all three of them?

A. If it were canned, it would be bacteria. If it were dry and it got too damp, it would be mold. If it were frozen and kept frozen, it could reduce in greater quality without any of them affecting it. That could change in color, it could change in weight, the evaporation, or flavor, but they wouldn't necessarily involve either yeast, molds or bacteria.

Q. In other words, by the freezing process all three of those elements—that is, yeast, molds and bacteria—are eradicated, so to speak?

(Testimony of Thomas Ornsdorff.)

A. They are prevented from growing in colder than the neighborhood of 20 Fahrenheit.

Q. Now, then, when yeast or mold or bacteria are not controlled, how do they operate on the raw fruit or vegetable to spoil it?

A. Yeast, molds and bacteria digest or putrify or make changes that are familiar to us. If it is a vegetable, there are natural enzymes in the thing that make it mature, grow, become starchy, sugary, or wet. If it is flesh material, they are commonly known changes, and if it is a bacteria it secretes enzymes different than our—different than are native to corn, and those dissolve certain portions and make it possible for the bacteria to use this food as food for itself. It [66] usually becomes watery, goes soft, and common methods of spoilage.

Q. Yes. Well, I mean, without—could you summarize that and say that the yeast, molds and the bacteria break down the organic matter in the raw vegetable or the raw fruit in their search for food for their own existence?

A. That is exactly it.

Q. Now, in comparing the process of canning and process of freezing for purposes of preserving food for off-season use, to what extent or up to what point are those processes the same?

A. Normally, the preparation for freezing and the preparation for canning are, in most cases, just alike.

Q. Yes. A. Might vary a little.

(Testimony of Thomas Ornsdorff.)

Q. Now, then, is the process of blanching the same in both processes?

A. It serves—it is usually the same. In some cases it is a little more severe for freezing because you have to inactivate the enzymes enough to do the trick, whereas in canning you may only wilt them and the inactivation may come along with the sterilization.

Q. Yes. Now, this process of blanching that foods must first undergo either for the canning process or the freezing process, exactly what is the purpose of blanching and what [67] does it consist of?

A. It is usually hot water or steam, usually regulated temperatures and times for cleansing, intensifies the color in many cases and reduces the bacteria, but that is of minor significance in either case. And it softens them so they will pack more efficiently. And in the case of freezing, particulary, its principal function there is to inactivate enzymes so that the spoilage by enzymes will not be possible later.

Q. Yes. Now, then, does the blanching process have anything to do with the color or the odor which would otherwise result from a frozen food or a frozen vegetable?

A. You mean does it affect the natural color or odor?

Q. Does it prevent disagreeable color or disagreeable odors from resulting?

A. Oh, yes. For instance, the enzyme in mush-

(Testimony of Thomas Ornsdorff.)

rooms will grow at a very low temperature and if you froze them and if you kept mushrooms very cold they would go bad while you were talking about it, even below zero. The carrots' enzyme structure is such, although they are not blanched, they keep very satisfactorily. So the enzymes are definitely associated with any changes of color or flavor, possibly others.

Q. Yes. Now, what are these enzymes that you are talking about?

A. An enzyme is, not to be too complicated and technical, [68] chemical material which causes changes without its being part of the change.

Q. Now, are there several different types and classes of enzymes, or is there just one?

A. Well, there are hundreds of them. You have probably dozens in you and an ear of corn has dozens, all of which are different.

Q. Now, when you activate the enzymes by the blanching process, does that result in the chemical change in the vegetable?

A. It is possibly debatable, but, for practical purposes, I'd say it didn't make any chemical change.

The Court: It did not?

A. It does not. The heat itself might have made some, but it is not associated,

Q. (By Mr. Scott): But the blanching process does make a difference in the structural make-up of the vegetable, doesn't it?

A. Some change, yes.

(Testimony of Thomas Ornsdorff.)

Q. And what is that change?

A. Usually a part similar to a partial cooking. It is a matter of heat, and it kills. You must appreciate that when you inactivate enzymes you are killing what made a life. A germ or whatever could make a body or a plant function is out once the enzymes are dead, inactive. [69]

Q. Yes. Then you also said that a blanching results in a softening of a vegetable so it's easier to pack, is that right?

A. Usually is more limber, things like beans and things like that.

Q. After a vegetable such as corn or carrots has been blanched, is there any difference in the cooking time to cook that commodity as compared with the same vegetable in its raw and natural state?

A. That will depend on the fruit or vegetable in question, but not make a material difference.

Q. How much difference would it—now, limiting your statement to kernel corn and corn on the cob, would there be any difference in the cooking time?

A. Well, Mr. Grigg said, I think, that they blanch corn on the cob eight minutes. Now, that is more than some housewives cook it. But the purpose was that if they didn't heat clear to the center of that corky cob some enzymes would be—would not become inactivated by the heat; they would proceed to affect it out through the cob until they came to the corn and proceed to spoil it. Now, the same corn, had it been cut off the cob, could be blanched in two

(Testimony of Thomas Ornsdorff.)

minutes more or less. So the amount of cooking it takes is associated with the blanch only indirectly.

Q. What are the particular enzymes that are inactivated by the blanching process? [70]

A. In the items, corn you speak of would probably be the ones that would change it noticeably, due to the many peroxidase and catalase, and they are commonly tested for in plant operation.

Q. Yes. Then, if those enzymes were not inactivated, what would be the result?

A. It would change in flavor would be the most obvious result. If this were apples, it would be a case of inactivating an oxidate which would cause it to change in color but not necessarily flavor. It would turn brown.

Q. Yes. Well, now, in regard to corn and carrots, what would be the result if these enzymes were not inactivated by the blanching process?

A. If they were frozen?

Q. Yes.

A. Without sufficient inactivation and in due time, depending on—it would be slower the colder it was—it would change the flavor materially. Corn would probably taste like the cob and peas would taste like the vines and mushrooms would smell so bad you couldn't taste them at all.

Q. Now, Professor Ornsdorff, when you pick or harvest a vegetable such as an ear of corn or a carrot, does the ear or the carrot die with the harvesting, or does it continue to live?

(Testimony of Thomas Ornsdorff.)

A. No, it continues to live the same as an apple or any [71] fruit or vegetable.

Q. And do their life processes continue after they have been harvested?

A. Picked from the plant?

Q. Yes.

A. Yes, indeed; because corn tastes fresh when you eat it—when you pick it; but if you keep it a few hours or overnight it will be less sweet; it changes, life processes have changed to starch and fiber.

Q. Now, what effect does the blanching process have on this living vegetable?

A. Well, life is a function of enzymes and if you inactivate the enzymes, obviously you have killed it, all life, plant and animal.

Q. After a vegetable such as corn or carrots has been blanched and frozen, is the tissue then dead or not? A. Dead.

The Court: May I interrupt, please?

Mr. Scott: Yes, sir.

The Court: Was that answer with reference to subsequent to blanching or subsequent to freezing?

The Witness: The tissue is dead subsequent to the blanching. Now, you might kill a thing by freezing it, too, but you would still have the enzymes to make changes.

The Court: That is what I was thinking. [72]

Q. (By Mr. Scott): Well, to clarify the matter, is the living vegetable killed by the blanching proc-

(Testimony of Thomas Ornsdorff.)

ess or by the combination of the blanching and the freezing process?

A. It might be either, depending on what it is. Some plants you can freeze without killing them; some you can't. But let's say that the blanching would do it in any event because that's not natural habitat or condition of the plant.

Q. It has been testified to in this case that the corn on the cob is blanched at 212° Fahrenheit. Would that blanching result in killing the living ear of corn? A. Yes, indeed.

Mr. Scott: At this time, your Honor, may we stipulate at what temperature the kernel corn and the carrots are blanched so I can ask this witness here?

Mr. Gallagher: Yes, if anybody knows.

The Court: You may confer with counsel.

Mr. Gallagher: I have another witness here who—if I might, your Honor——

The Court: Yes, you may.

(Discussion held between counsel.)

Mr. Gallagher: Apparently they are all about the same temperatures, difference in time.

The Witness: What temperature did he say?

(Discussion held between counsel.)

Q. (By Mr. Scott): Would a temperature of 260° to 280° Fahrenheit [73] be sufficient to kill the live tissues in kernel corn and diced carrots?

(Testimony of Thomas Ornsdorff.)

A. Oh, yes; most of them. Sufficient time at 170 or—80 would do it, but it's not practical.

Q. Now, in addition to killing the live tissue, is there any effect on the physical condition of the tissues by the process of freezing?

A. Yes. There will always be formation of crystals which are physically possible of rupturing and making some softening. If you freeze a tomato, why, you just can't keep it together; it goes soupy. But you can freeze a carrot and a piece of corn and not notice any differences.

Q. Yes. Now, did you say there are ice particles that form in the tissue? A. That is correct.

Q. Now, when these ice particles form in the tissue, is there any breaking down in the tissue as a result of that?

A. It's negligible of those products under standard processing, because it is done very quickly. If it were done slowly, it probably would make a noticeable difference.

Q Now, as a result of the combination of the freezing and the blanching process is there any chemical change in corn or carrots?

A. Not of any significance. There might be minor ones.

Q. Yes. Is there any change in the vitamin content as a [74] result of the blanching and freezing?

A. Only that some of them are affected by heat and some are soluble, so you might have washed out negligible amounts.

Q. Yes. Now, in your opinion, are corn and

(Testimony of Thomas Ornsdorff.)

carrots in their raw and natural state at the time of harvesting the same article as corn and carrots that have been blanched and frozen?

A. Did I understand you to say at the time of harvesting are they the same item as at the time of freezing?

Q. Yes. I mean, are they the same article or is it a changed article as a result of blanching and freezing?

A. Well, they are dead. If you had taken that carrot and stored it, you could have made seed. You could have planted and grown seed. But if you blanched it, you never could do that.

Q. Yes. Then, when carrots and corn have been frozen in bulk, are you—and then put in storage, are you then storing a commodity which is different from a commodity as existed when it was originally harvested?

A. Well, yes; it's different to the extent that I said in the case of carrots. And, as originally harvested, while a carrot has some days or weeks of useability, corn only has a matter of a day or two. Once they are in cold storage, frozen storage, their deterioration is materially reduced; it should be if it's a perfect job. It should be stopped right there. [75]

Q. Yes. Now, then, how long will that stoppage of deterioration continue in storage if it is properly handled with—I mean, it's properly frozen and properly packed and properly stored——

A. Well——

(Testimony of Thomas Ornsdorff.)

Q. ——so far as corn on the cob, kernel corn and diced carrots are concerned?

A. ——probably the least stable of those would be corn on the cob because, necessarily, the volume of package. And carrots would be something—the next most—no. The corn would be the next least stable, and carrots would hold the best. But that's because a little bit of change in carrot is not noticed much, but a little bit of change in dehydration, I think, as Mr. Grigg said, is very noticeable and very destructive to ear corn.

Q. Yes. Well, in this case here it has been stipulated that the whole kernel corn is stacked in a neoprene bag in 50-pound cardboard containers, the corn on the cob is packed—is placed in 64-cubic feet pallet bins lying with a sealed neoprene sack, and the carrots are put in neoprene sacks of 50-pound cartons. Now, how long can the corn and carrots under that packaging condition remain in cold storage without material loss in grade?

A. We will presume that they have been efficiently blanched, that there are no enzymatic changes. The only other changes [76] that can occur is the loss of moisture. Light isn't going to affect them, so there will be no color change. From that remote idea the only other thing is drying. Obviously, that will depend on the physics of the thing that if your temperatures are lower, say, five above zero or ten below, or something, there will be less drying the lower the temperature. That is a matter of just standard practice.

(Testimony of Thomas Ornsdorff.)

Secondly, if it is packaged in a neoprene bag or carton that is sealed with an overwrap that is really a vapor food seal, then no moisture could transmit from the product to the outside and be lost. Then the only changes would be, theoretically at any rate, from the product to the inside of the package or its surface for recrystallization.

Now, if that were crabmeat and you took out a very small percentage, it would be ruined; it gets tough. If it is corn on the cob, it is apparent; you would notice it. If it is carrots, you don't notice it so much. And when they are cooked you probably wouldn't notice it unless it was an extreme case. So if we had good packaging as those two processes—those two examples are good practices—it should keep in proportion to the uniformity and the coldness of the temperature.

Now, the lower the temperature the less air—the less moisture air will hold to carry away outside of the package or inside the package. The lack of circulation due [77] to the seal prevents its taking it away and then we have just to contend with keeping it in the package. Cream-style corn, which there is no spaces between but it's the same corn compacted and some water and juice with it, will keep for many years and in excellent condition. The other is a matter of relativity, how much of the package spaces into which some of your product could evaporate and recrystallize. Obviously, the larger the container the more closely it will fit together—the particles will fit together—the less proportion of

(Testimony of Thomas Ornsdorff.)

space there is for crystals to form the drier the product.

Q. In other words, as I understand your answer, it depends upon the circumstances of the case mostly as to how much effort you want to put into this storage produce as to how long the commodity will remain in storage without losing grade?

A. Yes, sir; at least in part.

The Court: I think this is a good place to interrupt for a short recess.

(Short recess.)

The Court: All right.

Cross-Examination

By Mr. Gallagher:

Q. Professor, talking about your last item in the testimony here relative to the stability of a product while it is in bulk cold storage, as I understand, first, if we assume as [78] in the pre-trial order that the—talking about the corn on the cob, first, that it is put in large packages of 64-cubic feet content——

A. The corn on the cob are in the 64-foot ones, too, are they?

Q. Yes. A. All right.

Q. And they are dumped in there with a neoprene lining sack, what would you say as to the rate of deterioration by dehydration — dehydrating, rather, while it is in that condition?

(Testimony of Thomas Ornsdorff.)

A. It would only be a guess. The corn would be more subject to that deterioration than most other items because there is more space around them. Maybe from a practical standpoint we should accept that we have perfectly uniform temperature, it didn't go up and down, it would soon come to equilibrium and stay there. So it would certainly deteriorate somewhat more rapidly in the cut corn in a similar container in direct proportion to the relative ratio of the space of corn. I would think in a year it would certainly show some marked deterioration.

Q. Would you expect a progression of deterioration and dehydration during the course of that year?

A. It will be constantly progressive, yes.

Q. And would that—now, taking the kernel cut corn, if that is in large containers with a neoprene bag and necessarily [79] there is air getting to it, would you expect to find dehydration in that kernel corn?

A. I think that would be—there, again, the same principle, fluctuations cause it to come out. There will be less fluctuation in the larger container than the smaller container. Now, if we would keep the large one and the small one both uniform, they probably would keep equally well. You can find noticeable difference between the package taken out of the corner case of a carlot shipment than one taken from the middle of the stack. I think that is standard. And a fellow shouldn't draw his samples from those corners and edges in all fairness. So I think that answers your question: it's relative.

(Testimony of Thomas Ornsdorff.)

Q. And would you expect there to be a difference in the corn on the cob, those cobs that are on top, deterioration there?

A. Even things that are waxy in an open box the top ones get to looking noticeably checked, discolored and shrunk. Down two inches, even though there is space between the prunes, there is noticeable difference, improvement in quality.

Q. Now, comparing that kind of an operation or preservation with a cut kernel corn in a retail pack, a 10-ounce pack in the wax container, perhaps a wax liner, and then wrapped with an overlay or a customers' wrap, there can be considerably less deterioration under those conditions, would there not?

A. Yes, I think, though, that the wax overwrap is not often [80] a good vapor seal. It is just a carton and a wrapper which paper probably is more permeable than the polyethylene or what bag you are using in the large containers. Obviously in the big one they settle together even though they are rigid and the spaces between them are much less and the larger they are the less the fluctuations in temperature.

Q. Now, assume that the product is put in a 10-ounce container with the overwrap on it and then that is put in a cardboard box filled up tightly, would you be reducing your dehydration to a minimum under those conditions?

A. Reducing it from where?

Q. Oh, as compared with corn on the cob, kernel corn in the large container in bulk storage.

(Testimony of Thomas Ornsdorff.)

A. I think we are comparing two things. Corn on the cob will have more surface and more area around it and will show the destruction most readily. The larger the package, perhaps, the less the destruction. But, there again, we would find storage, we could at least reduce it in any small package.

Q. Do I understand, then, that by and large if it is in the small retail package it would keep better?

A. No; it will keep better in the larger container. The more full the package is the better it would keep. If you took 30-pound tins and sealed them, one was two-thirds full and one was seven-eighths full, you would see the difference.

Q. And the retail package, is that a full 10-ounce package? [81]

A. Retail packages are far from full. The mechanics of filling it, the pieces that stick up, I dare say, would have maybe a fourth more space relatively in it.

Q. Now, in these products, and talking particularly of corn on the cob because that is the most graphic, I want to talk about and ask you about the comparative corn on the cob after it is frozen and as it is taken off the stalk. If your housewife is preparing corn on the cob right out of the garden as compared with her preparing a frozen ear of corn, as I understand it—some kind of a change; that is, the enzymes are dead? A. Uh huh.

Q. But, as far as appearances are concerned, there is very little difference in the appearance?

A. That is right, particularly on the cob, because

(Testimony of Thomas Ornsdorff.)

you have a complete film skin over that kernel. It is, for all practical appearances, much like a fresh ear of corn when you first blanched it.

Q. And, the cooking time is—there is no appreciable difference in the cooking time of the two ears?

A. Well, as I said before, unfortunately, in order to inactivate the center of that cob—but, which we don't—but we have to inactivate it because we probably cook it as he says eight minutes. I would say if it's a two-inch ear it would take ten minutes. [82] Now, the housewife, might have cooked that corn on the cob fresh from her garden six minutes and even enjoyed it very much, but—and it would be cooked in the sense that we commonly think of it as ready for the table.

Q. But do you think the housewife would take the frozen ear and cook that a longer period of time because of the frozen cob?

A. Yes. It will be overcooked as far as the fineness of the kernel to eat is concerned, but she will have to cook it to get rid of that ice, and if she doesn't you set it on the table steaming and you bite into something that's cold.

Q. As a matter of fact, there is no reduction; as a matter of fact, there is an increase in the cooking time of the frozen ear and the fresh one?

A. No reduction between the frozen and the fresh ear?

Q. Yes.

A. She probably cooks them much the same, longer, if anything.

(Testimony of Thomas Ornsdorff.)

Q. Yes. Now, and I understand you to say there is no appreciable structural change in the corn on the cob frozen?

A. That will depend partly on how fast it was frozen.

Q. Yes. And assuming an efficient freezing operation, there is no structural change?

A. That's right. In other words, if the next week after you froze it you served fresh corn and frozen corn they would [83] be much alike.

Q. Yes. And there is no change in the vitamin content between the fresh and the frozen?

A. There would be a minimum in corn because there couldn't be leaching and we are not eating it for Vitamin C which is heat-liable.

Q. And there is no chemical change?

A. I wouldn't say none, but it is negligible.

Q. Negligible. Now, in cooking a raw vegetable to serve on the table, you kill the enzyme there, do you not? A. Automatically.

Q. Automatically. And the only difference between a frozen ear of corn and a fresh e of corn, there are these enzymes are alive in one case and dead in another case?

A. A frozen and a fresh one?

Q. Yes.

A. That's the principal difference. Of course, we can't taste that, but from a commercial standpoint that's the significant difference.

Q. There is no taste in connection with the

(Testimony of Thomas Ornsdorff.)

enzyme? There is nothing that you can see or feel or——

A. Not unless they have acted on starch or sugar or something and changed it to a less desirable form.

Q. So it's—the very purpose of freezing—the whole frozen industry is based upon catching that fresh—— [84] A. Yes.

Q. ——commodity and preserving it in or as humanly possible as close to that fresh raw commodity, is it not? A. Yes.

Q. And there is no change in the freezing process as far as color content is concerned unless color additive is used or something?

A. If they were green things, we would say they were greener, but, actually, you are just taking the bubbles out of them; the color is the same amount if you extracted it. Corn looks slightly more golden, perhaps, but that is doubtful.

Q. That is why green frozen peas look so much like fresh peas? A. Yes.

Q. And——

A. The canning—the heat processes of canning actually change some of the green coloring matter.

Q. Now, there is no change in these items, types of changes—change in form like you take sugar and you make candy out of it, you take corn and you make syrup out of it—now, the things that we are talking about there is no such change as that type?

A. The candy was a recrystallization. It is a physical change.

(Testimony of Thomas Ornsdorff.)

Q. Yes. [85]

A. Now, there may be some physical change due to the freezing, structural change, softening. You know, it will go soft, so there may be, depending on the freezing and storing process. Now, storing practices can change the structure of things, too, because those crystals fluctuate in temperature; they will grow. A lot of little ones will grow into a few big ones. So there can be definite changes in storage.

Q. But so far as corn on the cob and carrots are concerned you have basically the same product at the end of the process as you do at the beginning of the process?

A. You mean at the end of the blanching, your freezing, and so forth?

Q. Yes.

A. Yes. Those withstand freezing better than tomatoes or something, yes.

Q. So, when we start out in that process we start out with a raw ear of corn, and when we are through with this and sell it to the housewife we still have our raw ear of corn, do we not?

A. I think essentially rawness means to us from a palatable standpoint is it cooked enough to be tender and is the starch broken so it tastes like a baked potato, and so forth. So, in that sense it's a raw vegetable.

Q. Yes. And, dealing with the term of natural state which [86] the Act uses here by that term they mean the natural state being the same state as

(Testimony of Thomas Ornsdorff.)

same general condition or same form. We start out with a natural ear of corn and we end up with a natural ear of corn, do we not?

A. No. We have a number of factors and the principal one is enzymes, and that's the one that changes. Any change to fiber to sugar to—back to starch to color, the degradation of color, the improvement of flavor, we can stop all those. So it is materially changed once it's blanched. It's not alive, it can't grow again, and those enzymes cannot change it. We can change it with physical things, but we can't change it with enzyme things after it's been blanched adequately.

Q. But the only change is made in the enzyme things; the other things are not changed; the color, the taste, the texture, and so forth?

A. Not materially. There are some losses, some changes.

Q. Now, the very type of preservation you referred to, refrigeration, canning, drying, smoking, chemicals, pickling, and this new wrinkle of radiation, I take it that refrigeration comes the very closest of keeping it in its raw natural state as compared to the other processes, does it not?

A. That is right.

Q. Are raw vegetables sterile?

A. No. I will qualify that. The interior of an undamaged [87] vegetable or flesh is sterile, but the surfaces are not always. Now, it would be possible to fumigate or sterilize. They sterilize spices with-

(Testimony of Thomas Ornsdorff.)

out heating them, so it's possible but not probably practical.

Q. And did you say that this corn when that is frozen it is sterile or not sterile?

A. It is not sterile. You have reduced a number of living organisms, but the sources are still there.

Q. So you have that similarity between the ear of corn off the field and the frozen ear, neither of those is sterile? A. That's right.

Q. Are these frozen items perishable?

A. Yes. Perishable would be somewhat like spoilage. There is no definition that is any good, but if they are changed enough to be less desirable then they certainly would be to that extent perishable.

Q. And after they are frozen do they continue to be perishable? A. Yes.

Q. In other words, you have to do something to those products to keep them from becoming perishable?

A. Just continue good storage conditions, good packaging conditions.

Mr. Gallagher: Yes. I think that is all. Let me have just a moment, your Honor.

The Court: Yes, you may. [88]

Mr. Gallagher: Just one further question:

Q. If this bulk storage in the 64-cubic foot container is an open-sack deal or folded-over-sack deal, will there be a difference in that than a tightly sealed container that excludes all air?

A. The sealed container will obviously be the best.

(Testimony of Thomas Ornsdorff.)

Q. Yes.

A. We say that—there is a pressure of any vapor—it's gas, and it has a pressure, a measurable one; it doesn't puff up your bag, but it's enough to make it move out. So the more poorly it is laid over or folded the more will be the dehydration of the evaporation, call it what you want.

Q. Yes. And if it were a heat deal, with some way of creating a vacuum, I presume that would be the perfect——

A. Would be certainly better. A block of ice in that cold room we know will evaporate, get round on the corners and disappear. The same thing will happen to any produce in there. If we could protect it with something that was close to it, it would be better.

Mr. Gallagher: That is all.

Redirect Examination

By Mr. Scott:

Q. Professor Ornsdorff, did you state that in the blanching process of corn that the corn is subjected to heat for a longer [89] period than a housewife would cook the same corn if she bought it fresh at the market?

A. That on the cob is because if she cooks it on the cob she is only interested in making it taste good, the kernel, and she is not interested in the cob. It never bothers her. But if she blanches it—if it were blanched enough to heat that cob that might be

(Testimony of Thomas Ornsdorff.)

longer in the blanch than she would cook it to eat it. But if she cooks corn from a frozen state, that corn is like a piece of cork and once it's frozen it's the deuce to get the ice out of it again. So she might cook it somewhat longer. If she doesn't cook it longer, it might get cold unless she eats it very promptly.

Q. Yes. Now, you testified a little while ago, didn't you, that when vegetables are frozen ice forms in the tissues? A. Yes, sir.

Q. Now, does that cause any structural change in the tissues with that formation of ice crystals?

A. Yes, but it may or may not be of significant difference. If it is in a tomato, the thing comes all to pieces, but if it is in a carrot or corn it makes a negligible amount of difference and it is comparable in—somewhat to the additional heat that you put when you cook the same carrot.

Q. Is there any difference in the water content as a result of freezing in regard to corn or carrots, or does the water content remain the same? [90]

A. It's still in there just the same. You have softened it a little so it would drain out more readily after it is frozen, but the water content has no place to go; it's frozen right in there.

Q. Now, I think you said that perishability—what did you say, it's a matter of degree, or what did you say about perishability?

A. I tried to associate it with spoilage. Maybe we can think of it like that.

(Testimony of Thomas Ornsdorff.)

Q. Well, now, when you have an ear of corn or a carrot that is newly harvested and it is still a living plant, the perishability in regard to that article is the activity of the micro-organisms, is that right? A. And enzymes.

Q. And enzymes? A. Either or both.

Q. Yes. At that stage of the life of the vegetable we are not concerned with perishability due to dehydration, are we? A. No.

Q. Now, then, we take that carrot and we take that corn and we blanch it and we freeze it. Now, then, the perishability that we are interested in now is the dehydration, is that right?

A. If it's sufficiently inactive enzymatically so we don't have these—they are the limiting factor, really. [91]

Q. Yes. In other words, if the vegetable is sufficiently blanched and sufficiently frozen, then the activity of the micro-organism has been stopped, is that right?

A. The cold temperature does that.

Q. Yes. The cold temperature? A. Yes.

Q. And when we talk about perishability, then, of a frozen vegetable, it is perishability due to the dehydration?

A. Yes, which is largely controllable, see?

Q. Yes. Now let me go into that point. Deterioration of a frozen vegetable in storage can be regulated, can it not? A. At least in part.

Q. Yes. And what means can we use to regulate the deterioration?

(Testimony of Thomas Ornsdorff.)

A. Well, I think it has been gone over, the vapor-proof package or container and the uniformity of storage and the lowness of storage. Things even if they weren't wrapped would dry much less rapidly as the temperatures were much lower.

Q. Yes. Now, then, are humidifiers ever used in a cold-storage room to control dehydration?

A. To keep your dehydration down on things that wouldn't be so perfectly packaged. It is good practice to keep your humidity high on poultry and things like that. And most noticeably they don't do it by putting humidity into the air; [92] they do it by insulation of the primary surface and reduce the air velocity if practical. So you improve your storage situation and automatically build up your humidity.

Q. Yes.

A. In many package storages there is as much attention given to that as if it were poultry.

Q. Would you say, then, that plant structure has something to do with controlling dehydration during cold-storage? A. You mean the room?

Q. Yes, the structure of the plant.

A. Oh, yes; definitely.

Q. Would you say that not only is controlled by the insulation of the plant but also such things as having the double doors on the entrances?

A. Yes; although plants are quite successful with single doors. But the general line that would increase the uniformity of your temperature allowing you to have lower temperatures without exces-

(Testimony of Thomas Ornsdorff.)

sive costs investmentwise and operatingwise would be beneficial.

Q. Yes. Now, I think that you said, didn't you, that the freezing of vegetables is about the nearest approach of preserving the vegetable in its original condition during the off-season, is that right?

A. Yes, sir.

Q. But, as I understand your testimony, there is a difference [93] between a vegetable maybe with particular reference to corn and carrots in the state in which it is originally harvested and in the state after it has been blanched or frozen?

A. There is a material difference in that when it is originally harvested the corn, for instance, would change 50 per cent of its sugar content from sugar to starch, obviously making it less palatable in 12 hours at room temperature. But a noticeable change in zero storage properly packaged and blanched goes on over a course of many months. On a fresh vegetable, corn notably, peas, and things like that, go down rapidly. Root crops, perhaps cauliflower and some others might be good for some dates. Deterioration is of a different nature due to different causes. You see, there are living causes when it is fresh; the others are physical causes.

Q. Yes. Well, now, but I understand that the difference is between life and death between the vegetable when it's originally harvested and when it's blanched and frozen. A. Yes.

Q. In one instance it is a live, living organism and in the other instance it's a dead organism.

(Testimony of Thomas Ornsdorff.)

A. Correct.

Mr. Scott: That is all, your Honor. [94]

Recross-Examination

By Mr. Gallagher:

Q. Then can you see that difference in looking at it?

A. You could kill a vegetable. You could kill it. Heat, chemicals, sulphur dioxide and things, probably couldn't see the difference.

Q. And it's all dead before the eating unless you eat it raw? A. That is right.

Q. Let me ask you this question: Suppose you had a fresh ear of corn and a frozen ear of corn and you set it out on the table, which would perish faster? Would either of them?

A. They would go in different ways. One would get—the blanched one is soft and wet and mold and things would start in on it and it would sour and get whiskery. The fresh one is probably dry on the surface and it would get starchy and just kind of punk, just old.

Q. So, as an item both of them if you set them out at room temperature on a table are highly perishable items, are they not?

A. Under those circumstances, yes.

Mr. Gallagher: That's all. Thank you.

(Testimony of Thomas Ornsdorff.)

Recirect Examination

By Mr. Scott:

Q. I would like to ask a question on this following because [95] Mr. Gallagher went into it. Isn't it a fact that vegetables that have been frozen deteriorate more rapidly on thawing than vegetables freshly harvested?

A. If you grow root crops, they are somewhat—they are wet from condensation and from the freezing. Things could germinate on them and bacterially they would spoil quickly. The fresh one wouldn't spoil bacterially unless an infection got through the skin or something. So they are hardly comparable.

Q. Well, is there an answer to the question that I just gave you, then? Does a frozen vegetable deteriorate faster upon thawing than that same vegetable would newly harvested?

A. Take peas——

Q. Let's take corn or carrots.

A. It would depend on the infection, how clean the place was, what got it started. The fresh one, if anything, could get through the skin of the—we will presume the fresh one has skin on it—it would take off at the same rate of micro-organism spoilage, but the other one is wet, the blanching didn't materially make any difference, so it's relative. It might be one or it might be the other.

Q. Would they deteriorate—would there be any difference in the nature of the deterioration between a thawed vegetable and a vegetable newly harvested?

(Testimony of Thomas Ornsdorff.)

A. The newly harvested one can spoil by enzymatic changes [96] affecting color and flavor and texture, but the other one is not going to spoil by the enzymatic changes because they are all inactivated.

Q. Yes. And what would be the nature of the thawed vegetable?

A. It would become sour, probably molds and souring organisms.

Q. Would that be an activity of micro-organisms or what? A. Yes, it would.

Mr. Scott: That is all.

Mr. Gallagher: That is all. Thank you.

The Court: Professor, may I ask you one question, please? You heard the testimony concerning the practice of packaging after having been frozen in bulk?

A. Yes.

Q. And you heard the testimony of the witness with reference to that, he takes them out of cold storage and places them in a retail package and then places them back into the freezer? A. Yes.

Q. Would there be anything in that process in your opinion that would change the characteristic of the article?

A. No. Under reasonable operating conditions it is only out there a little while; it doesn't thaw. I think Mr. Grigg stated that it doesn't take too much time, so, for all practical purposes it's like everybody does it. [97]

* * *

DALE DUNHAM

produced as a witness on behalf of the Defendants, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gallagher:

Q. Now, Mr. Dunham, you are from Ontario, are you not? A. Yes.

Q. And you are here in response to a subpoena served upon you by the defendant? A. Yes.

Q. And what is your position, Mr. Dunham?

A. Well, I am employed in the Department of Agriculture. I am in charge of the area between Boise and La Grande, Oregon, in processed products inspection.

The Court: I am sorry; I didn't catch it.

The Witness: The Department of Agriculture.

The Court: Thank you. United States?

The Witness: Yes.

Q. (By Mr. Gallagher): And how long have you been with the United States Department of Agriculture? [99] A. Since 1949.

Q. And what schooling have you had?

A. I have a Bachelor's degree from the University of Oregon.

Q. What course? A. Chemistry.

Q. And what did you do after you got out of school?

A. Went directly to work with the Department of Agriculture, and I have been working with them ever since.

(Testimony of Dale Dunham.)

Q. Can you tell the Court what your work consisted of particularly from the line of chemistry and why it is necessary to be a chemist to hold your job?

A. Well, it isn't necessary to be a chemist, but we have to have some training in chemistry. Inspectors are food technology majors. We have to check the enzymatic activity of the frozen vegetables to determine whether they have been properly blanched, check acid content of certain fruits, citrus juices, and such, and many other chemical determinations.

Q. And has your work since getting out of school consisted of that sort of thing you have been testifying to? A. Yes, it has.

Mr. Gallagher: We offer him as an expert witness.

Mr. Scott: We accept him as an expert.

The Court. Let the record so show.

Q. (By Mr. Gallagher): Now, how much of your time is spent in the plants of the Oregon Frozen Foods or Ore-Ida Potato [100] Products?

A. Oh, I would estimate about 80 per cent.

Q. And do you go all through the plant and see all their operations, and are you acquainted with the operations from a year-around basis?

A. I do. We have a contract with this particular plant, the Oregon Frozen Foods, our Yakima office, and I have been assigned to the plant since 1951 as an in-plant inspector and I also have the rest of the area around Ontario, as I said, from Boise up to La

(Testimony of Dale Dunham.)

Grade to cover, also. And I have one or two other inspectors under me who help me in this work.

Q. Now, skipping on down to the frozen corn on the cob, tell the Court how the bulk corn on the cob is stored, will you?

A. Well, last year most of it was stored in these large 64, approximately, cubic feet cribs. They are within plastic bags which were lapped over on the top but not sealed, and these stacked up in storage three high.

Q. Now, last year did they have some built with slats?

A. Yes. Some of them were slats and some were solid.

Q. Some were solid. Do they use fiberboard on the solid ones?

A. I believe that is what it was, yes.

Q. And how is the kernel corn stored?

A. It is stored in 60-pound corrugated fiber cases, and the [101] corn is within plastic bags which, again, are lapped over on top but not sealed. The case itself is sealed.

Q. I see. A. But not airtight.

Q. Now, have you had occasion to observe this bulk corn coming outside of cold storage?

A. I have.

Q. And have you run chemical tests on it?

A. I have.

Q. Do you run one for dehydration?

A. No; that is visual.

(Testimony of Dale Dunham.)

Q. That is visual. Describe your visual check for dehydration.

A. It's simply corn that has lost its moisture content. It is usually lighter in color and quite a bit lighter in weight and has lost all its flavor.

Q. Taking corn that has been in cold storage after the active processing season ends, describe, if any, that you have noticed—any dehydration in corn on the cob.

A. Corn on the cob in the cribs deteriorates quite rapidly because of the—what you might say would be low density of the container. The cobs are put in there loosely, not systematically lined up or anything, but just loosely, so there is a considerable air space within the—within the crib itself. And there is probably more variation in temperature [102] in the crib due to its size from the center of the crib to the outside and the seal on the bag within the crib is not airtight; it is merely lapped over, and there is considerable—most of the dehydration occurs on the top of this crib from the passage of air back and forth that is in a seal such as it is on top of the crib.

Q. Now, does that dehydration result in losing grade from Fancy to Grade—what is the next grade down?

A. Well, B Grade would be the next grade down. Yes, it's usual.

Q. Is the word "Fancy"? Is that correct?

A. Well, whatever the corn is when it dehydrates it back a cull.

(Testimony of Dale Dunham.)

Q. I see.

A. It has no grade. We have to throw it out.

Q. So dehydrated corn goes from Fancy or B——

A. We just have two kinds of cob corn, Fancy and Grade B.

Q. And is it graded before it goes bulk form in cold storage? A. Yes, it is.

Q. And nothing but B and Fancy go in there, is that correct? A. Well, we try to do that.

Q. Yes. That's theoretically—— A. Yes

Q. When it comes out and part of it is dehydrated, that has lost its grade entirely? [103]

A. It has, yes.

Q. And do you know from your observation there the practice is whether or not they pull some of this corn out of cold storage during the actual active season?

A. Yes. If there is time—time will allow, they pull it out; yes.

Q. And do they follow the practice of first-in-first out? A. If it's possible.

Q. Now, can you give us any kind of an idea how much dehydration there is, say, 30 days after the active season is over or 30 days after it has been in cold storage or 60 days or 90 days?

A. Last year, as I recall, we first noticed dehydration about Christmas or around the Christmas holidays and, then, of course, it just got progressively worse and it has been quite bad recently.

Q. Can you give us any idea at that time—or,

(Testimony of Dale Dunham.)

this time about how much it was, substantial or just a minimum?

A. It became a problem—you mean percentagewise?

Q. I don't think you could probably give it percentagewise.

A. You would just have to start looking.

Q. I thought you could describe what a serious situation——

A. I wouldn't say it was serious yet, but it definitely became a problem on certain cribs that were in an airstream within storage; it would become a problem, and then as time [104] progressed more of the cribs became problems and individual cribs, there was more corn in there than was dehydrated.

Q. Now, do you find dehydration like that after the corn on the cob has been put in a retail package and packed two to the package and 24 in a case and the case sealed?

A. We don't have much of a problem there for the reason that it is heat-sealed. The bag that contains the two ears is heat-sealed.

Q. It is heat-sealed in the small two-package——

A. Yes.

Q. Now, what do they do to cut down on this dehydration in bulk package—bulk cold storage? What is the practice to stop that?

A. The only thing that you can do is just make sure that the bag in which the corn is put within the crib is sealed as much as possible, lapped over, and it is carefully done.

(Testimony of Dale Dunham.)

Q. Well, what I am driving at is this: Is there any attempt made to get them in the retail packages at its earliest possible date?

A. I wouldn't know that.

Q. That question——

A. That would be out of my line.

Q. Oh, yes. Is there any requirement that you know of to have an inspection made within any particular length of time prior to the date of shipment to determine grade? [105]

Mr. Scott: Your Honor, we object to that question unless he defines requirement as the Federal requirement.

The Court: Yes. I think we should be consistent.

Mr. Gallagher: Very well, your Honor.

Q. Is there any trade practice or contract requirements—I am not speaking of a statutory requirement or anything like that—in the trade itself?

A. There are several Government agencies that require—that have a time limit on the certificate. For instance, the Quartermaster market centers who do all the buying for the armed services now require a certificate no older that five to seven days.

Q. Now, how does that come about? Is that a matter of contract or approximation, or what are the mechanics of it?

A. That stipulation is usually in the contract that the packer receives from the Quartermaster market center. It is in each contract. However, it is always the same; it is always five to seven days.

(Testimony of Dale Dunham.)

Q. And are you the man that supplies that certificate? A. I am.

The Court: May I interrupt, please? From what date, the date of harvest or——

A. The certificate should be no older than five to seven days from the date of shipment to Quartermaster market——

The Court: And what does it certify? [106]

A. The quality of the product.

The Court: The quality of the product. I see what you mean.

Q. (By Mr. Gallagher): In other words, they require a grade certificate from you as an inspector of the United States Department of Agriculture to to be dated within five or seven days of the date of shipment? A. That is right.

Q. And why is that?

A. I have no idea. I don't know.

Q. Why wouldn't your certificate 90 days or 120 days do just as well?

Mr. Scott: We object, your Honor.

The Court: Yes. That is speculative.

Q. (By Mr. Gallagher): You have heard the testimony of the Professor here as to the fact that there are no appreciable changes other than the question of killing the enzymes. We object to that as a leading question.

The Court: Well, I think he is just laying a foundation.

Mr. Gallagher: Yes, I am.

Q. What have you to say from your knowledge

(Testimony of Dale Dunham.)

there as to whether or not there is any chemical change because of this plant freezing?

A. I don't quite understand you.

Q. Well, is there any chemical change in their corn or [107] carrots or potatoes as a result of the freezing process there at the defendants' plant?

A. I can't argue with the Professor. I agree with him.

Q. You agree with him? A. Yes.

Q. And structural changes, I think he said, there is no substantial structural change?

A. As he pointed out, if a product is frozen within a fairly short time, you don't get large crystals. And, corn, of course, is frozen very rapidly, particularly whole kernel, and we have no problem there. Even the cob corn is frozen rapidly on the surface, anyway, and any time that might involve would be within the cob; that takes the longest to freeze.

Q. Is there any change in the vitamin content of these products?

A. I am not qualified to answer that.

Q. I see. Do you agree with him that the only change is this change in the fact that the enzymes are alive in one case and they are dead in another case? A. I do.

Q. And is that anything that is apparent to the eye? Can you detect that by looking at it?

A. No.

Q. No change in color or composition or appearance or anything else—— [108]

(Testimony of Dale Dunham.)

A. Blanching——

Q. ——simply by virtue of the fact that these enzymes are dead?

A. Not by virtue of the fact the enzymes are dead. There is a difference in color—and blanching, as he poinfed out—it's more intensive color.

Q. Yes. That is particulary true of the green vegetables?

A. Corn becomes quite brighter.

Q. We have been speaking largely of corn and carrots. Do those same things hold true of potatoes?

A. Yes, they would. Yes.

Q. What have you to say about which would perish faster if we laid them out at room temperature, the frozen ear of corn or a fresh ear of corn?

A. I would hesitate to answer that. I have never actually tried the experiment.

Q. And, in your opinion, the process discussed here is the process that comes closest to giving to the housewife a raw fresh vegetable as compared to these other methods of preservation?

A. It is my opinion, yes. It is the closest.

Mr. Gallagher: I think that is all.

(Testimony of Dale Dunham.)

Cross-Examination

By Mr. Scott:

Q. Mr. Dunham, do I understand you to say that at the plant [109] of the Oregon Frozen Foods Company that only Fancy and B Grade corn is packed in bulk for later repackaging?

A. Cob corn, that's the only two grades that are in cob corn, A Grade and B Grade.

Q. Yes.

A. So that is naturally the only two we pack.

Q. Yes.

A. There is—unlesss you want to classify substandard as a grade.

Q. No. A. We don't pack that.

Q. Not unless they freeze substandard corn over there in bulk. Do they? A. They don't.

Q. Well, we won't talk about it then.

A. I am talking about cob corn.

Q. Yes.

A. Now, cut corn, there is a third grade, there is A, B and C.

Q. Yes. Now, as I understand, A Grade and Fancy are the same? A. That's correct.

Q. B and C are two more grades?

A. Yes.

Q. Now, of the corn on the cob that goes into bulk storage [110] as Fancy or B Grade at the Oregon Frozen Foods Company, what amount or what percentage of that turns into—turns into culls before it is repackaged?

(Testimony of Dale Dunham.)

A. Due to dehydration?

Q. I don't care what—due to whatever turns it into culls.

A. I would have to make a guess, and it would be awfully wild. I don't know.

Q. Do you know the answer to that question?

A. I do not.

Q. Now, it is stipulated in the pre-trial order, that the active corn season ends on October 10 and that the repackaging of the bulk frozen corn that is on the cob and on the kernel is repackaged to the extent of 90 per cent between October 10th and March 1 and that remaining 10 per cent is repackaged between March 1 and August 1. Is it your contention—or what is the fact as to whether or not corn can be packed—repackaged as late as the following August 1 and not lose grade?

A. Well, what do you mean by not lose grade? There are some individual cobs in cob corn that will lose grade; there are some that won't.

Q. Yes. Well, let me ask you this: In your experience as an inspector at the plant of the Oregon Frozen Foods Company do they repackage bulk frozen kernel and cob corn as late as the following August 1 without a loss of grade? [111]

A. Well, you can't answer that because there is some that is going—they have to cull out some of it.

Q. Yes. Does some lose grade?

A. There is some, yes.

Q. Does more lose grade or does more not lose grade, do you know?

(Testimony of Dale Dunham.)

A. Oh, there is—in a—take just for instance a crib of cob corn that has dehydrated to some extent, there is generally at least 50 per cent that's still all right.

Q. Is it any more than 50 per cent, or is it just 50 per cent? A. That is all right?

Q. Yes, that is all right.

A. Generally a little more. At the worst it is not more than half.

Q. Well, at best what is it?

A. The best is perfect.

Q. Of course, we never do have the best, do we?

A. Never do have.

Q. Well, now, you know from practical experience, don't you, of making these investigations of what percentage of the bulk frozen corn on the cob and the bulk frozen kernel corn loses grade by the following August, don't you?

A. You mean if, for instance, there were 2,000 cobs in a crib what percentage of them would be dehydrated? [112]

Q. No. I am not talking about any theoretical problem; I am talking about the actual corn that is stored at the plant of the Oregon Frozen Foods Company, what percentage of the corn on the cob and the kernel corn loses grade by the following August that is originally packaged in bulk?

A. I don't keep records like that. I don't know.

Q. But you do know that at least some of it is graded without loss of grade by the following August? A. Yes.

(Testimony of Dale Dunham.)

Q. Isn't it also that practically all of it is graded without loss of grade by the following August?

A. Oh, I can't answer that either. What do you mean by practically all of it?

Q. Well, 90 per cent.

A. I couldn't pin it down with percentage, no.

Q. Well, 80 per cent?

A. I still can't pin it down to a percentage. I don't keep records like that. I just grade. I don't know how much they throw out.

Q. Beg your pardon?

A. I don't know how much they throw out. When they repackage a lot, I grade what they come up with as repacked, but I don't know what——

Q. All right. Let's start out this way: When the corn is packaged in bulk—— [113] A. Yes.

Q. ——both kernel and cob corn, you make an inspection don't you? A. In the bulk?

Q. Yes. A. Yes.

Q. When it is originally frozen? A. Yes.

Q. All right. Now, then, do you make an inspection of that same package when it is taken out of storage to be repackaged?

A. Before it is repackaged?

Q. Yes. A. Occasionally, not always.

Q. All right. On the occasions when you do what has been your experience as to whether or not there has been a loss in grade?

A. Well, I have noticed that there is dehydration in the packages.

Q. I am not talking about what you have no-

(Testimony of Dale Dunham.)

ticed. What has been your experience as to whether or not there is a loss of grade or not?

A. Well, my experience is what I have noticed.

Q. All right. What is your experience? I am not talking about an isolated cob or something like that. We will admit that it is not 100 per cent perfect, but what has been your [114] experience as to whether or not there is a loss of grade when it is taken out of the bulk and repackaged?

A. My experience is that there has been a deterioration of the product to some extent.

Q. There has been a deterioration, but has there been any loss of grade?

A. Oh, our interpretation of grade is the same.

Q. All right.

A. As a matter of fact, that's where we are having trouble. If you take a lot of corn of 50,000 pounds in bulk, a year later you can repack that and maintain the same grade.

Q. Yes.

A. However, you may have to throw out some corn more so than you would earlier in the season.

Q. That's what——

A. Is that what you are trying——

Q. That's right. We both agree on that. All right. Now, then, in your experience of grading it when you—when you take the bulk package out to repackage it, you have the original certificate you can see, can't you? A. Yes.

Q. All right. Now, then, what has been your ex-

(Testimony of Dale Dunham.)

perience as to whether or not there has been a loss of grade during the storage period?

A. Of the entire lot? [115]

Q. Yes.

A. Well, I have noticed many lots do lose—go completely out of grade unless they are repacked, particulary when they are in the bulk.

Q. I know that if it is not repackaged sometimes it is going to go out of grade. But in this case here it is stipulated that it is repackaged before the following August. Now, what has been your experience as to whether or not there is a loss of grade by the following August 1st?

Mr. Gallagher: I think the question has been answered several times, your Honor.

The Court: I just have a feeling that the counsel and the witness are speaking of the same thing.

The Witness: Well, I attempted to answer that by saying that within a year's time bulk corn will —certain lots are out of grade.

The Court: Do you have any information as to how much would be discarded and can be packaged——

The Witness: No, I don't.

The Court: Out of a given lot?

Mr. Scott: Oh, well, if you have no information, then—did you have any information or do you know what the turnover of wholesalers is as to their frozen food, how many times a year they turn over their stock?

A. I have no information of that type. [116]

(Testimony of Dale Dunham.)

Q. Now, you said something a moment ago about some corn dehydrating where the crib was in an airstream. A. Yes.

Q. Now, naturally when a crib is in an airstream, it is going to dehydrate faster, is that right?

A. Yes, it should.

Mr. Scott: I think that is all, your Honor.

The Court: Redirect?

Mr. Gallagher: Just one question, your Honor, and I think this is going to complete our case.

The Court: All right.

Redirect Examination

By Mr. Gallagher:

Q. When you make this final inspection, what condition are the goods in then? Are they in bulk or package, or what?

A. Are you referring back to the Army again?

Q. Yes.

A. It has to be in the condition that the Army received it in, physically, that is.

Q. That is the package condition?

A. Yes. It has to be in that condition.

Q. So that in between that inspection that you made, final inspection, the corn has been repacked—has been graded and repacked and regraded and in the final condition just before [117] it goes on board cars? A. Yes.

Mr. Gallagher: I think that is all.

(Testimony of Dale Dunham.)

The Court: Are both parties through with these witnesses now?

Mr. Gallagher: I might have one—I am through with this witness and the Professor. Are you?

Mr. Scott: Yes, your Honor.

The Court: Well, then I take it they may be released from their subpoenas?

Mr. Scott: Yes.

Mr. Gallagher: I might suggest, your Honor, that if I could have just a moment here we might just close this now.

The Court: Do you want to be heard orally?

Mr. Gallagher: I would suggest that subject to Counsel's and your Honor's pleasure that we submit some short memorandum of our positions and the law on the matter. There is quite a bit of law. And, if your Honor would care for it, we would be very glad to submit it.

The Court: Whatever you wish. I will hear you orally if you want to, or if you want time to file a written memorandum you may do so.

* * *

[Endorsed]: Filed September 30, 1955. [118]

[Title of District Court and Cause.]

DOCKET ENTRIES

1954

July 15—Filed complaint.

July 15—Issued summons—to marshal.

July 30—Filed summons with return.

Aug. 16—Filed answer of Oregon Frozen Foods Co.

Aug. 16—Filed answer of Ore-Ida Potato Products Co.

1955

Jan. 11—Entered order setting for pretrial conference on Jan. 28, 1955, at 9:15 a.m.

Jan. 24—Entered order setting for pretrial conference on Feb. 28, 1955.

Feb. 21—Entered order setting for pretrial conference on March 21, 1955.

Mar. 21—Entered order setting for pretrial conference on April 18, 1955.

Apr. 18—Entered order setting for pretrial conference on May 23, 1955.

May 23—Lodged pretrial order and 1 copy.

June 22—Entered order setting for trial on July 25, 1955.

June 22—Filed and entered pretrial order.

July 19—Issued subpoena and 1 copy to Attorney Georgeff.

July 21—Issued subpoena and 1 copy to Attorney Gallagher.

July 25—Entered order amending pretrial order by striking out lines 28 to 31, inc., on page 10; record of trial before court and order for deft. to submit briefs 15 days after receiv-

1955

ing transcript (due in 2 weeks) and pltff. to file answering brief 15 days after defts. brief filed.

July 20—Filed subpoena with marshal's return.

Sept. 30—Filed transcript of proceedings, July 25, 1955.

Oct. 3—Filed pltfs. reply memorandum.

1956

Oct. 2—Filed opinion of the court.

1957

Jan. 28—Lodged Findings of Fact and Conclusions of Law and Judgment.

Feb. 25—Record of hearing on settlement of findings.

Mar. 15—Filed and entered Findings & Conclusions.

Mar. 15—Filed and entered Decree.

May 13—Filed notice of appeal by plaintiff.

June 5—Filed designation of contents of record on appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Com-

plaint; Answer of Oregon Frozen Foods Company; Answer of Ore-Ida Potato Products Inc.; Pretrial order; Opinion of Judge East; Findings of Fact and conclusions of law; Decree; Notice of appeal; Designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7583, in which James P. Mitchell, Secretary of Labor, United States Department of Labor, is the plaintiff and appellant and Oregon Frozen Foods Company and Ore-Ida Potato Products, Incorporated, are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings filed in this office in this cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 7th day of June, 1957.

[Seal] R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15579. United States Court of Appeals for the Ninth Circuit. James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellant, vs. Oregon Frozen Foods Company and Ore-Ida Potato Products, Inc., Appellees. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: June 10, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15579

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

OREGON FROZEN FOODS COMPANY and ORE-IDA POTATO PRODUCTS, INC.,

Appellees.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 17(6) of the Rules of this Court, appellant makes the following statement of the points on which he intends to rely:

1. The lower court erred in making Finding of Fact No. (8) and in making Conclusions of Law Nos. (3) and (7).

2. The lower court erred in holding that the overtime exemptions provided in Sections 7(c) and 7(b)(3) of the Fair Labor Standards Act of 1938, as amended, for the "first processing of * * * perishable or seasonal fresh fruits or vegetables" extends to employees of a processor engaged in mixing, repackaging and storing vegetables which have already been cleaned, cut, blanched, frozen, packaged and placed in storage either by their employer or by other processors.

3. The lower court erred in failing to grant injunctive relief as to employees engaged in storage, mixing and repackaging operations performed on frozen vegetables after the active season, as prayed for in the complaint.

/s/ STUART ROTHMAN,
Solicitor;

/s/ BESSIE MARGOLIN,
Assistant Solicitor;

/s/ SYLVIA S. ELLISON,
Attorney;

/s/ LAWRENCE P. HOCHBERG,
Attorney, United States
Department of Labor.

[Endorsed]: Filed June 25, 1957.

175 In United States Court of Appeals for the Ninth Circuit

Minute entry of argument and submission
(omitted in printing)

January 17, 1958

176 In United States Court of Appeals for the Ninth Circuit

Order directing filing of opinion and filing and recording of judgment

April 16, 1958

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

177 In United States Court of Appeals for the Ninth Circuit

No. 15,579

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Before FEE and CHAMBERS, Circuit Judges, and CHASE A. CLARK, District Judge

Opinion

April 16, 1958

CHASE A. CLARK, *District Judge*.

This action was brought by the Appellant to enjoin the Appellees from violating provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. Sec. 201i et seq. The facts, as found by the trial court, are set out in that Court's opinion at 145 F. Supp. 157.

The issue on appeal relates to the trial court's holding that the "repackaging of bulk frozen corn and carrots after the active season ends and the mixing of frozen vegetable mix and the storing of frozen vegetables" are exempt under Section 207(b)(3) and 207(c), as acts being part of the first processing of perishable or seasonal fresh fruits or vegetables.

Pertinent provisions of Title 29, United States Code, are as follows:

178 "SECTION 206. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1 an hour; * * * ";

"SECTION 207. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employees for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature * * *.

(c) * * * in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations * * * the provisions of subsection (a) of this section, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

A determination of what constitutes "first processing" depends upon the facts of each individual case. This question was resolved by the trial court's finding, as to the products here in question, "that 'first processing' is completed when the products are packaged in consumer size packages even though delayed."

It was for the trial court to appraise the evidence, both the agreed facts and the testimony presented, and to draw
179 or reject inferences therefrom. The trial court is the finder of facts, and as found, those facts support the conclusion adopted.

Having concluded that the case here turns upon the factual issues decided by the able Judge of the District Court, the Judgment below is Affirmed.

180 In United States Court of Appeals for the Ninth Circuit

No. 15,579

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

vs.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEE

Judgment

Filed April 16, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

181 In United States Court of Appeals for the Ninth Circuit

Order directing filing of opinion on petition for rehearing

September 24, 1958

Ordered that the typewritten opinion this day rendered by this Court in above cause on Petition for Rehearing, be forthwith filed by the Clerk.

182 In United States Court of Appeals for the Ninth Circuit

No. 15,579

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEES

Opinion upon Petition for rehearing

September 24, 1958

Before FEE and CHAMBERS, Circuit Judges, and CHASE A. CLARK, District Judge

PER CURIAM:

The petition for rehearing assumes that this Court has followed an incorrect approach and has held that the findings of the trial court were affirmed because not found clearly erroneous. We take our stand firmly upon the findings of fact and the able opinion of the District Judge, which clearly interprets the statute in the light of the facts so found. Mitchell vs. Oregon Frozen Foods Company, 145 F.Supp. 157, 162–163. But this Court simply found that the interpretation of the clause of the statute relating to "first processing,"[1] in view of the facts found in the record, was correct. We do not view the ruling as applicable only in this case, but as an interpretation universally valid when such a state of facts arises. However, an interpretation cannot be made without facts. The interpretation placed upon such facts relating to the fruit and vegetable industry by a judge fully cognizant of the problems of farmers and orchardists in an agricultural area is entitled to high respect. It has heretofore often been pointed
183 out that Congress attempted to alleviate the burdens placed upon farmers and orchardists by exceptions of

[1] 29 U.S.C.A. § 207(c).

which this clause is an example.[2] The processor does not pay the toll of the statute. Therefore, the exception is for the benefit of the producer.

The stock argument that one claiming an exemption must bear the burden of proof to show that it is applicable on the facts is entirely inconsistent with the argument that the findings of fact can have no weight in the interpretation of the language. In this area, the appeliate courts have consistently given weight to interpretations by the trial judges familiar with conditions.

There is nothing in our decision in Union Pacific Railroad Company vs. Ore-Ida Potato Products, Inc., 9 Cir., 252 F. 2d 505, which is applicable here. It was there held that potatoes which were washed, peeled, sliced, steamed or washed, oil blanched, at 350° Fahrenheit for one and one-half minutes and then quick frozen, were not "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened)," within the tariff prescribing shipment rates for such vegetables. We there held the findings of the trial court "contrary to the undisputed evidence" and "clearly erroneous." In a footnote we pointed out that decisions under the clause here under consideration were not "particularly helpful" in deciding that case.[3] Markedly, that tariff declares "vegetables" are "fresh or green" although "frozen." The essence of that opinion is that "Frozen vegetables which have been partially cooked and are no longer wholly raw are not frozen fresh vegetables." We affirm that decision. The usages of trade are in accord.

The attempt to import into this field questions relating to business establishments and independent contractors illustrates the fact that the government agency has never appreciated the purpose of Congress to alleviate the weight of the provisions of the act in reference to farmers and orchardists.

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[2] Walling vs. California Conserving Co., 74 F. Supp. 182, 184, affirmed sub nom. McComb vs. Hunt Foods, Inc., 9 Cir., 167 F. 2d 905, 906, cert. den., 335 U.S. 845; McComb vs. C. H. Musselman Co., 74 F. Supp. 185 (sustained by the Court of Appeals for the Third Circuit, although there is no reported opinion); Hendricks vs. Di Giorgio Fruit Corporation, 49 F. Supp. 573, 576.

[3] Union Pacific Railroad Company vs. Ore-Ida Potato Products, Inc., 9 Cir., 252 F. 2d 505, 508, note 8.

184 "First processing" should not apply to picking, gathering, digging of vegetables or fruits. It certainly is absurd to say it is accomplished by storing, as appellant seems to urge. It would be likewise a perversion to say that "storing" in a cool place was processing. If the cold be mechanically applied, no difference is apparent. If the temperature be artificially decreased so the product is frozen, still no processing has been accomplished. No significant change has taken place. Until such a change takes place, there is no processing. Cooking in oil might well be held to be processing. But that question is not before us. The whole emphasis of the clause in question is upon the words "first processing." Neither freezing nor subjection to steam is processing in common acceptance of the term or in trade usage. Decay is stopped by such methods, but there is no essential change such as is attained by the manufacturing process of blanching in oil. We do not rely upon dictionary definition, but it is believed that stored apples subject to refrigeration are not, in either vulgar or trade usage, described as "processed." Likewise, frozen fresh strawberries are not viewed as processed by the consumer. "Process" is defined by the dictionary as "to subject to some special process or treatment, as in the course of manufacture."

We affirm our holding, deny the petition for rehearing and reject the suggestion of a rehearing en banc.

185 [Clerk's certificate to foregoing transcript omitted in printing.]

186 Supreme Court of the United States
No. 711, October Term, 1958

[Title omitted.]

Order allowing certiorari

April 6, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1959

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Miscellaneous:

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Cruess, *Commercial Fruit and Vegetable Products* (1948) 12

1958 *Directory of Frozen Food Processors*, published by the trade journal, Quick Frozen Foods 12

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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. ——

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on April 16, 1958, a petition for rehearing having been denied on September 24, 1958.

OPINIONS BELOW

The opinion of the district court (R. 49–63) is reported at 145 F. Supp. 157. Its findings of fact and conclusions of law (R. 64–72) are unreported. The opinion of the court of appeals (App. A, *infra*, pp. 18–20) is reported at 254 F. 2d 116. Its opinion on petition for rehearing (App. C, *infra*, pp. 22–25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1958 (App. B, *infra*, p. 21). A timely petition for rehearing was denied on September 24, 1958 (App. C, *infra*, p. 22). By orders of Mr. Justice Douglas, dated December 19, 1958, and January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and including February 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a frozen foods processor who freezes vegetables and packs them in bulk containers during the harvesting season, stores them until after the season has ended, and thereafter repackages them in consumer packages is engaged in the "first processing of * * * fresh fruits or vegetables" during the post-seasonal storing and repackaging so as to be exempt under § 7(c) of the Fair Labor Standards Act from the overtime requirements of the Act.

2. Whether a frozen foods processor who mixes vegetables previously frozen by it with vegetables purchased, already frozen, from others is entitled to the exemption under § 7(c) while engaged in preparing and packaging the mixed vegetables.

3. Whether the repackaging or mixing operations qualify for an additional exemption under § 7(b)(3) of the Act.[1]

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[1] The exemption under § 7(c) is limited to a maximum of 14 weeks per year. Section 7(b)(3) provides an additional 14-week exemption (up to 12 hours a day and 56 hours a week) for industries "found by the Administrator to be of

STATUTE INVOLVED

Section 7 of the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*) provides in part:

> (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> * * * * *
>
> (c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in

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a seasonal nature." The Administrator has determined that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" within the meaning of § 7(b)(3). 5 Fed. Reg. 3167. Since the wording of the § 7(b)(3) industry determination is substantially identical to that of § 7(c), the availability of both exemptions turns, initially at least, on the same question—the meaning of "first processing"—and the § 7(b)(3) exemption is not separately discussed in this petition. The question is separately preserved, however, both because both exemptions were allowed by the courts below and because, should the Government not prevail on its main contention, there may be additional reasons for sustaining its position under § 7(b)(3). See note 9, *infra*.

any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

STATEMENT

1. Respondent Oregon Frozen Foods Company (Oregon) is engaged in the production and sale in interstate commerce of frozen corn, carrots, and mixed vegetables (R. 14). During the harvesting season, it receives from nearby growers large quantities of corn and carrots which must be promptly processed and frozen. As part of the preparation for freezing (in addition to cutting, cleaning, *etc.*), the vegetables are subjected to steam for several minutes in order to kill the enzymes that are responsible for organic growth and deterioration (R. 16–18, 122). This "blanching"—in effect, a "partial cooking" (R. 17, 98, 124)—also softens the vegetables and intensifies their color (R. 122–123). After being quick-frozen in a loose form (R. 83), some of the vegetables are immediately packaged in consumer-size packages. Normally, however, only a small part of the vegetables

(*e.g.*, less than one-third of the 1954 corn crop (R. 24)) are so packaged during the season. The balance is packed in bulk containers and placed in cold storage for repackaging after the season ends (R. 17, 25, 52).

Although it is desirable to dispose of the frozen vegetables as soon as possible after the season ends, in order to avoid the risk of dehydration during storage, the lack of firm orders for the vegetables—a large part of which are packaged under "buyers' labels" (R. 82, 112)—often causes the repackaging operations to be spread out over many months (R. 89). Thus, although the active corn season extends only from August 1 to October 10, the repackaging of bulk-frozen corn continued, for the 1954 crop, until the following May 22; for the 1953 crop, until August 1; and for the 1952 crop, until February 1 (R. 66). The active carrot season is from October 15 to December 1, but the repackaging of carrots continues throughout December (*ibid.*).

In addition to repackaging the bulk-frozen corn and carrots as such, Oregon also prepares and packages, from October into January, a vegetable mix consisting of corn, carrots, lima beans, string beans, and peas (R. 14). The vegetables other than corn and carrots it purchases, already frozen in bulk, from frozen food processors in Oregon, Washington, and California (R. 19). All the vegetable mix is packaged under "buyers' labels" (R. 112).

Oregon employs some 300 production workers to process corn during the active corn season, but retains only 20 after the end of the season to sort, in-

spect, grade, and repackage the bulk-frozen corn (R. 19). It employs 40 production workers to handle carrots during the active carrot season, but retains only 20 after the season to repackage the bulk-frozen carrots and prepare the vegetable mix (R. 20).

2. Section 7(a) of the Fair Labor Standards Act of 1938 (*supra*, p. 3) requires that employees engaged in the production of goods for commerce be paid time-and-a-half for work in excess of 40 hours a week. Section 7(c), however, provides that:

> * * * in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables * * * the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

In 1952 and 1953, Oregon, claiming exemptions under §§ 7(b)(3) and 7(c), did not pay overtime rates for work performed during selected weeks, some of which were during the active harvesting season when Oregon was engaged in processing and freezing freshly-harvested vegetables, while others were during periods in which Oregon was engaged in storing, repackaging, and mixing vegetables previously frozen and stored in bulk (R. 23, 36). It is stipulated that Oregon will continue that practice unless enjoined in this action (R. 23–24).

3. On July 15, 1954, the Secretary of Labor brought this action, under § 17 of the Act, seeking an injunction restraining Oregon from violating the overtime re-

quirements of the Act (R. 3–6). It was conceded that Oregon was entitled to an exemption under § 7(c) during periods when it was engaged in the original freezing and packaging (either in consumer-size packages or bulk containers) of the vegetables received during the harvesting season (R. 30–32, 67). It was contended by the Government, however, that the post-seasonal storing, mixing, and repackaging of the vegetables previously frozen in bulk did not constitute "first processing" within the meaning of § 7(c) and hence that Oregon was not entitled to an exemption when so engaged (R. 27).

The district court held that the repackaging of the bulk-frozen vegetables was not a "new process" but a "reasonable continuation and part of 'the first processing of perishable or seasonal fresh fruits or vegetables' ", which was not completed until the vegetables were "packaged in consumer size packages even though delayed" (R. 62, 68). It accordingly held that Oregon was entitled to an exemption when engaged in the post-seasonal repackaging operations (R. 49–63).[2] The court of appeals affirmed, holding in its first opinion that the question turned upon "factual issues" and that the "facts support the conclusion adopted" (*infra*, p. 20). In an opinion denying rehearing, the court explained its first opinion as holding simply that the district court's "interpretation of the clause of the statute relating to 'first processing,' in view of the facts found in the record, was correct" (*infra*, p.

[2] It also upheld Oregon's claim of an additional exemption under § 7(b)(3). See note 1, *supra*.

22). The court further stated, however, that blanching and freezing did not amount to "processing" at all (*infra*, pp. 24–25).

REASONS FOR GRANTING THE WRIT

1. Even limited to its impact upon the frozen foods industry itself, the question presented by this case is of substantial importance in the administration of the overtime provisions of the Fair Labor Standards Act. The frozen foods industry processes a major, and constantly increasing, share of the national food production. Because of its obvious advantages, the practice of storing frozen produce in bulk and repackaging it after the rush of the season has ended is already widespread in the industry. That those advantages are being increasingly recognized is evidenced by the report that during the 1957 season some western packers changed from the use of the usual 50-pound storage containers "to bulk containers holding as much as 1,500 pounds of frozen vegetables." *Bulk Bins Save on Frozen Food Storage,* Western Canner & Packer, Vol. 49, No. 10, p. 211 (Oct. 1957). As that article points out (*ibid.*), the "economies presented in the procedure are apparent": "From bulk storage the packer can package as orders and labels are received. Premium labor can be avoided, and packaging can be done by the regular crew after the rush season has passed."[3] The decision in this case, there-

[3] Other obvious advantages are that less packaging equipment is necessary; that bulk storage may afford greater protection against dehydration than does storage in consumer packages (see R. 135); and that any dehydrated pieces can be removed during the repackaging process (see R. 25–26).

fore, will affect many thousands of workers throughout the frozen foods industry.

While the exemption granted by § 7(c) is limited to a maximum of 14 workweeks—some of which the packers are admittedly entitled to utilize during the harvesting season—the importance of the question is increased by the fact that there is available an additional 14-week exemption under § 7(b)(3) defined in terms identical to the relevant part of § 7(c).[4] While the latter exemption is limited to a maximum of 12 hours a day and 56 hours a week (the § 7(c) exemption contains no hours limitation), judicious selection of the weeks to which to apply each exemption results in a substantially complete exemption for a total of 28 workweeks per year—over half the year and probably sufficient to cover any occasions on which use of overtime might be desirable. In short, the decision below, by permitting the exemptions to be utilized during repackaging operations, effectively gives the fruit and vegetable frozen foods industry a year-round exemption from the overtime requirements of the Act.

2. The question on the merits is substantial. The exemption is granted for the "first processing of * * * perishable or seasonal fresh fruits or vegetables." The clear purpose of the exemption is to afford relief from the maximum-hour limitations during periods when the use of overtime is made unavoidable by the "seasonal" influx or the "perishability" of the produce—that is, by natural factors beyond

[4] See note 1, *supra*.

the control of the packer.[8] Viewed in the light of that purpose, "first processing" should, we submit, be interpreted as terminating when the vegetables have been "processed" to a non-perishable state and there

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[8] Even the court below has recognized this underlying purpose of the § 7(c) exemption. See *McComb* v. *Hunt Foods, Inc.*, 167 F. 2d 905, 906–907 (C.A. 9), certiorari denied, 335 U.S. 845, stating:

> The Wage and Hour Division has recognized the clear intendment of the statute in this language:
>
> "The purpose of Section 7(c), as shown by the legislative debates, was to relieve processors and packers of seasonal agricultural commodities from the burden of paying overtime compensation during those peak seasons of the year when large fluctuating quantities of perishable agricultural commodities move from the farms to the processing establishments, which commodities must be processed as soon as they arrive." Wage and Hour Release No. 1892, Jan. 25, 1943.

For other cases recognizing, in differing contexts, the "seasonal" purposes of the various § 7(c) exemptions, see *Walling* v. *Swift & Co.*, 131 F. 2d 249, 251 (C.A. 7) ("It was the purpose of Congress, in granting this exemption, to enable the employer to avoid the burden of time and one-half for overtime in those seasonal or peak periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control."); *Hendricks* v. *Di Giorgio Fruit Corp.*, 49 F. Supp. 573, 575 (N.D. Cal.) ("The legislative history of the Act shows that Congress realized that perishable or seasonal fresh fruits or vegetables must be processed when they reach the proper stage and that such stage depends upon natural factors which man cannot control."); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393, 401–402 (S.D. Cal.); *Shain* v. *Armour & Co.*, 50 F. Supp. 907, 911–912 (W.D. Ky.); cf. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 271.

is a break in the processing operations. The subsequent operations are free of the seasonal or perishability pressures that are the very reason for the exemption.

a. In this case, when the vegetables have been frozen and stored in bulk at zero temperatures, they are no longer "perishable", in the sense that the word is used in the statute,[6] and the initial processing has been halted. The rate at which the repackaging is done after the season ends is governed not by natural factors but by the employer's convenience and the receipt of orders. That there does not then exist the necessity for overtime that justifies the exemption is convincingly shown, in this case, by Oregon's drastic reduction of its work force at the end of the active corn season from 300 to 20 employees. When, therefore, upon receipt of orders, Oregon withdraws

[6] There is some risk of dehydration if frozen vegetables are stored too long, but that is largely controllable by storage conditions (R. 144–145). In any event, such long-term dehydration involves deterioration of a very different order—both in terms of causation (bacteriological or enzymatic causes as contrasted to the operation of external physical forces) and in terms of urgency (a few days as contrasted to many months)—than that normally associated with "perishability." The risk of dehydration, moreover, is alleviated not by the repackaging as such but only by the final sale and consumption of the vegetables. So long as the vegetables are to be stored, the evidence is that they are less subject to dehydration when stored in bulk than when stored in consumer packages (R. 135). Thus the rate of repackaging is controlled not by perishability but by the receipt of orders. Indeed, the possibility of partial dehydration would, if anything, seem to require that repackaging be postponed until orders are received, so that the dehydrated vegetables can be removed during regrading.

the previously "processed" vegetables[1] from storage and regrades, reinspects, and repackages them, it should be treated as being engaged in "secondary" processing incidental to its marketing operations and not in the "first processing" necessary to preserve fresh fruits and vegetables from spoilage.

That interpretation of "first processing" has been consistently followed by the Administrator of the Wage and Hour Division since the adoption of the Act. The regulations now provide (29 C.F.R. (1958 Supp.) 780.51(b)(1)):

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[1] The suggestion of the court below, in denying rehearing, that blanching and freezing do not amount to "processing" at all (*infra*, pp. 24–25) is difficult to understand. Unless they are "processing" they cannot be "first processing", which is the very basis upon which the exemption was allowed. It is clear in any event that freezing is "processing", not only in the common acceptance of the term (*e.g.*, the industry's own directory is entitled *Directory of Frozen Food Processors* and the *1954 Census of Manufacturers* lists the industry under "frozen food processing establishments") but also in the sense that it significantly changes the form of the commodity. There can be no question that blanching (which kills the enzymes and "partially cooks" the vegetables (R. 17, 98, 122–124)) and freezing (which "disorganizes the tissues, renders them permeable, and liberates enzymes" (Cruess, *Commercial Fruit and Vegetable Products* 765 (1948); R. 139, 143)) change the natural state of the vegetables just as surely as "bulking" does tobacco. See *Mitchell* v. *Budd*, 350 U.S. 473. In addition, quick-freeze plants, like tobacco-bulking plants, require a large amount of expensive equipment of an industrial type, including conveyor belts, equipment for washing, sorting, dicing and cutting, steam chambers, freezing tunnels, refrigeration equipment, packaging machinery, and zero-temperature storage rooms. See R. 16–19. The question in this case, in short, is not whether any of the steps amount to "processing," which they clearly do, but whether the discontinuous operations should be viewed as separate processings or as one single processing.

> An employer who commences processing operations on a perishable commodity to which the exemption in section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including by-product operations, which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable. * * *

The above interpretation was first formally announced, in substantially its present form, in Wage and Hour Release No. 1892, January 25, 1943, and has been outstanding, and consistently applied, ever since.[8] Even if the question were otherwise dubious, the consistent interpretation of the Act by the agency charged with its enforcement would, we submit, be controlling.[9] See *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner* v. *Mitchell*, 350 U.S. 247, 255. That interpretation is further required by

[8] See also 17 Fed. Reg. 9615, construing "first processing" as limited to "the initial operation which changes the form of the whole fresh fruit or vegetable and all operations on its main portions when performed in a single process as a continuous series of operations throughout which the commodity remains perishable * * *."

[9] Even if not controlling on the interpretation of § 7(c), the Administrator's definition of the term "first processing" would seem necessarily to govern the meaning of that term as used in the Administrator's own industry determination under § 7(b)(3) (see note 1, *supra*). See, *e.g.*, *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832 (C.A. 5).

the settled principle that exemptions from the Fair Labor Standards Act are to be "narrowly construed." *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617.

b. While we think it clear that Oregon is not entitled to an exemption even when engaged only in repackaging vegetables previously frozen by it, there is a further reason why the exemption is inapplicable during periods when it is also engaged in mixing and packaging vegetables purchased, already frozen, from other processors. The processing of such vegetables is undeniably broken when they are packaged in bulk by the original processor and sold and shipped to Oregon, and Oregon's subsequent mixing operations seem clearly to be a "second" processing. That result is also required by the interpretive regulations under § 7(c), which, as noted above, should be controlling (29 C.F.R. (1958 Supp.) 780.51(b)(2)):

> Where first processing operations are performed at one place of employment on a commodity named in section 7(c), and further processing operations on the processed commodity are then performed at another place of employment, such further processing operations are not part of the "first processing" of the named commodity which commenced at the first place of employment, but comprise a separate process. * * *

Since Oregon's mixing operations commence, as to such vegetables, not with "fresh" vegetables but with already frozen vegetables, those operations, viewed separately, cannot independently qualify for the exemption.

In allowing the exemption even during the mixing operations, the decision below is also in substantial conflict with that of the Court of Appeals for the Tenth Circuit in *Domenico* v. *Mitchell*, 232 F. 2d 112. In that case, the employer, engaged primarily in packing and distributing fresh vegetables purchased from nearby farmers, also purchased "mountain grown" vegetables which had been previously packed by others. Work performed by the employer on the latter vegetables (handling from one car to another, re-icing the cars, or repacking broken crates) was held not to be within the § 7(c) exemption for "first processing." While the cases are arguably distinguishable in that in *Domenico* the second processor was in part "re-doing" what had already been done, while Oregon performs a "further" operation, that distinction would seem, if anything, to make the operations here even more clearly second processing.

3. It is important that the question be promptly resolved. As a practical matter, the protection to workers afforded by the Fair Labor Standards Act is effective only prospectively from the resolution of questions of interpretation of the Act. Individual employees seldom have a sufficient financial interest to sue for unpaid wages, particularly if an unsettled question is involved, and recovery of unpaid overtime depends largely upon suits brought by the Secretary on behalf of the employees under § 16(c). The Secretary, however, is expressly foreclosed from bringing such a suit "in any case involving an issue of law which has not been settled finally by the courts" (§ 16(c)). In such cases, the Secretary must proceed

by an injunction action under § 17 (in which the court has no jurisdiction to award back pay), and it is only after the injunction suit has been finally resolved and the issue settled that the Secretary may sue for the employees' unpaid wages.[10] When, long after the violations were discovered, a back-pay suit is finally initiated, the recovery is limited to wages accruing within two years of the commencement of the back-pay action (§ 6, Portal-to-Portal Pay Act, 61 Stat. 87, 29 U.S.C. 255). The practical effect of these provisions is that enforcement of the Act in any contested areas is effectively prevented pending final resolution of the question in injunction cases. This case, initiated in July 1954, has now been in the courts four and a half years, and an attempt to develop a conflict in another circuit would delay enforcement of the employees' rights, even if ultimately upheld, for several more years.

Effective enforcement of the Act in the food-processing industry has already been delayed for many years by the controversy over the Administrator's definition of the "area of production" (within which persons engaged in enumerated operations upon agricultural commodities are exempted by § 13(a)(10) from both the minimum wage and the overtime requirements of the Act). The Administrator's original definition was held invalid in 1944 in

[10] "Even a cursory examination of these provisions shows that the injunction is the only effective device available to the Secretary when coverage is in doubt and he wishes to establish the availability of the Act to employees not theretofore afforded its protections". *Mitchell* v. *Lublin, McGaughy & Associates*, No. 37, this Term, decided January 12, 1959.

Addison v. *Holly Hill Co.*, 322 U.S. 607, and the validity of the revised definition was not finally upheld until this Court's decision in 1956 in *Mitchell* v. *Budd*, 350 U.S. 473. In the meantime, many frozen foods processors, including Oregon, challenged the validity of the definition and claimed exemption under § 13(a)(10).[11] Now that that question has been settled, persons not within the area of production as defined by the Administrator (as Oregon is not) are asserting claims of exemption from the overtime requirements under § 7(c), and that question has now come to the forefront. To forestall further delays in the enforcement of the Act in the frozen foods industry, that question should be promptly settled.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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FEBRUARY 1959.

[11] Oregon claimed an exemption under § 13(a)(10) in the district court, but the claim was denied after this Court's decision in the *Budd* case. There is still, of course, an unresolved question whether frozen food processors are within the § 13(a)(10) exemption even if located in the "area of production."

APPENDIX A

In the United States Court of Appeals
for the Ninth Circuit

No. 15,579—Apr. 16, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Before FEE and CHAMBERS, *Circuit Judges*, and CHASE A. CLARK, *District Judge*

CHASE A. CLARK, *District Judge*:

This action was brought by the Appellant to enjoin the Appellees from violating provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. Sec. 201 et seq. The facts, as found by the trial court, are set out in that Court's opinion at 145 F. Supp. 157.

The issue on appeal relates to the trial court's holding that the "repackaging of bulk frozen corn and carrots after the active season ends and the mixing of frozen vegetable mix and the storing of frozen vegetables" are exempt under Section 207(b)(3) and 207(c) as acts being part of the first processing of perishable or seasonal fresh fruits or vegetables.

Pertinent provisions of Title 29, United States Code, are as follows:

SECTION 206. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1 an hour; * * *.

SECTION 207. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employees for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature * * *

(c) * * * in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations * * * the provisions of subsection (a) of this section, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

A determination of what constitutes "first processing" depends upon the facts of each individual case. This question was resolved by the trial court's finding, as to the products here in question, "'that 'first processing' is completed when the products are packaged in consumer size packages even though delayed."

It was for the trial court to appraise the evidence, both the agreed facts and the testimony presented, and to draw or reject inferences therefrom. The trial court is the finder of facts, and as found, those facts support the conclusion adopted.

Having concluded that the case here turns upon the factual issues, decided by the able Judge of the District Court, the Judgment below is Affirmed.

(Endorsed:) Opinion. Filed Apr. 16, 1958.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 15,579

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEE

JUDGMENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered April 16, 1958.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX C

In the United States Court of Appeals for the Ninth Circuit

No. 15,579—Sept. 24, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

vs.

OREGON FROZEN FOODS COMPANY AND ORE-IDA POTATO PRODUCTS, INC., APPELLEES

UPON PETITION FOR REHEARING

Before FEE and CHAMBERS, *Circuit Judges,* and CHASE A. CLARK, *District Judge*

PER CURIAM: The petition for rehearing assumes that this Court has followed an incorrect approach and has held that the findings of the trial court were affirmed because not found clearly erroneous. We take our stand firmly upon the findings of fact and the able opinion of the District Judge, which clearly interprets the statute in the light of the facts so found. *Mitchell* vs. *Oregon Frozen Foods Company,* 145 F. Supp. 157, 162–163. But this Court simply found that the interpretation of the clause of the statute relating to "first processing,"[1] in view of the facts found in the record, was correct. We do not view the ruling as applicable only in this case, but as an interpretation universally valid when such a state of facts arises. However, an interpretation cannot be made without facts. The interpretation placed upon

[1] 29 U.S.C.A. § 207(c).

such facts relating to the fruit and vegetable industry by a judge fully cognizant of the problems of farmers and orchardists in an agricultural area is entitled to high respect. It has heretofore often been pointed out that Congress attempted to alleviate the burdens placed upon farmers and orchardists by exceptions of which this clause is an example.[2] The processor does not pay the toll of the statute. Therefore, the exception is for the benefit of the producer.

The stock argument that one claiming an exemption must bear the burden of proof to show that it is applicable on the facts is entirely inconsistent with the argument that the findings of fact can have no weight in the interpretation of the language. In this area, the appellate courts have consistently given weight to interpretations by the trial judges familiar with conditions.

There is nothing in our decision in *Union Pacific Railroad Company* vs. *Ore-Ida Potato Products, Inc.*, 9 Cir., 252 F. 2d 505, which is applicable here. It was there held that potatoes which were washed, peeled, sliced, steamed or washed, oil blanched, at 350° Fahrenheit for one and one-half minutes and then quick frozen, were not "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened)," within the tariff prescribing shipment rates for such vegetables. We there held the findings of the trial court "contrary to the undisputed evidence" and "clearly erroneous."

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[2] *Walling* vs. *California Conserving Co.*, 74 F. Supp. 182, 184, affirmed sub nom. *McComb* vs. *Hunt Foods, Inc.*, 9 Cir., 167 F. 2d 905, 906, cert. den., 335 U.S. 845; *McComb* vs. *C. H. Musselman Co.*, 74 F. Supp. 185 (sustained by the Court of Appeals for the Third Circuit, although there is no reported opinion); *Hendricks* vs. *Di Giorgio Fruit Corporation*, 49 F. Supp. 573, 576.

In a footnote we pointed out that decisions under the clause here under consideration were not "particularly helpful" in deciding that case.[4] Markedly, that tariff declares "vegetables" are "fresh or green" although "frozen." The essence of that opinion is that "Frozen vegetables which have been partially cooked and are no longer wholly raw are not frozen fresh vegetables." We affirm that decision. The usages of trade are in accord.

The attempt to import into this field questions relating to business establishments and independent contractors illustrates the fact that the government agency has never appreciated the purpose of Congress to alleviate the weight of the provisions of the act in reference to farmers and orchardists.

"First processing" should not apply to picking, gathering, digging of vegetables or fruits. It certainly is absurd to say it is accomplished by storing, as appellant seems to urge. It would be likewise a perversion to say that "storing" in a cool place was processing. If the cold be mechanically applied, no difference is apparent. If the temperature be artifically decreased so the product is frozen, still no processing has been accomplished. No significant change has taken place. Until such a change takes place, there is no processing. Cooking in oil might well be held to be processing. But that question is not before us. The whole emphasis of the clause in question is upon the words "first processing." Neither freezing nor subjection to steam is processing in common acceptance of the term or in trade usage. Decay is stopped by such methods, but there is no essential change such as is attained by the manufacturing process of blanching in oil. We do not rely upon dic-

[4] *Union Pacific Railroad Company* vs. *Ore-Ida Potato Products, Inc.*, 9 Cir., 252 F. 2d 505, 508, note 8.

tionary definition, as it is believed that stored apples subject to refrigeration are not, in either vulgar or trade usage, described as "processed." Likewise, frozen fresh strawberries are not viewed as processed by the consumer. "Process" is defined by the dictionary as "to subject to some special process or treatment, as in the course of manufacture."

We affirm our holding, deny the petition for rehearing and reject the suggestion of a rehearing en banc.

(Endorsed:) Per Curiam Opinion upon Petition for Rehearing. Filed Sept. 24, 1958.

PAUL P. O'BRIEN, *Clerk.*

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 33

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (R. 49-63) is reported at 145 F. Supp. 157. Its findings of fact and conclusions of law (R. 64-72) are unreported. The opinion of the court of appeals (R. 175-177) is reported at 254 F.2d 116. Its opinion on petition for rehearing (R. 178-180) is reported at 264 F.2d 599.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1958 (R. 177). A timely petition for rehearing was denied on September 24, 1958 (R. 177-180). By orders of Mr. Justice Douglas, dated

December 19, 1958, and January 23, 1959, the time for filing a petition for a writ of certiorari was extended to and including February 21, 1959. The petition for a writ of certiorari was filed on February 19, 1959, and granted on April 6, 1959 (R. 180). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a frozen foods processor who freezes vegetables and packs them in bulk containers during the harvesting season, stores them until after the season has ended, and thereafter repackages them in consumer packages, is engaged in the "first processing of * * * fresh fruits or vegetables" during the post-seasonal storing and repackaging so as to be exempt under § 7(c) of the Fair Labor Standards Act from the overtime requirements of the Act.

2. Whether a frozen foods processor who mixes vegetables previously frozen by it with vegetables purchased, already frozen and packed in bulk, from others is entitled to the exemption under § 7(c) while engaged in preparing and packaging the mixed vegetables.

3. Whether the repackaging or mixing operations qualify for an additional exemption under a determination made by the Administrator under § 7(b)(3) of the Act.

STATUTE AND RULING INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. 201, *et seq.*) are as follows:

Sec. 7.(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

* * * *

(3) for a period of periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any

> place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.
>
> * * * * *

The determination made by the Administrator of the Wage and Hour Division, Department of Labor, on August 23, 1940 (5 Fed. Reg. 3167), provides in part:

> The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of section 7(b)(3) of the Fair Labor Standards Act and Part 526 as amended of the Regulations issued thereunder.

STATEMENT

On July 15, 1954, the Secretary of Labor brought this action under § 17 of the Fair Labor Standards Act (52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*) to enjoin respondent Oregon Frozen Foods Company (Oregon)[1] from violating § 7(a) (and

[1] Respondent Ore-Ida Potato Products, Inc., a closely-affiliated company sharing Oregon's premises, is a party only

therefore § 15(a)(1) and (2)) of the Act (R. 3-6). Section 7 (a) requires that employees engaged in the production of goods for commerce be paid time-and-a-half for work in excess of 40 hours a week. Section 7(c), however, provides that:

> * * * in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables * * * the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

For the "first processing * * * of perishable or seasonal fresh fruits and vegetables" there is also available an *additional* 14-week exemption under a determination made by the Administrator under § 7(b)(3) of the Act.[2] The district court, after trial, held that Oregon was engaged in the "first processing" of fresh vegetables, and hence entitled to the exemptions, during all the periods involved (R. 49-72). The court of appeals affirmed (R. 175-177) and denied rehearing (R. 178-180).

1. Oregon, with a highly mechanized plant[3] lo-

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because the two companies jointly employ a common office, maintenance, and warehouse force, which employees are exempt only when Oregon's production employees are also exempt (see R. 67, 69). The issues here involve only Oregon's production employees.

[2] See pp. 26-27, *infra*.

[3] The plant, shared with Ore-Ida (see note 1, *supra*), has five quick-freezing units, four with moving belts and one stationary, two cold storage rooms, and various huskers,

cated at Ontario, Oregon, is engaged in the production and sale in interstate commerce of frozen corn, carrots, and mixed vegetables (R. 14). During the harvesting season, it receives from nearby growers large quantities of corn and carrots which must be promptly processed and frozen. As part of the preparation for freezing (in addition to cutting, cleaning, etc.), the vegetables are subjected to steam for several minutes in order to kill the enzymes that are responsible for organic growth and deterioration (R. 16-18, 122). This "blanching"—in effect, a "partial cooking" (R. 17, 98, 124)—also softens the vegetables and intensifies their color (R. 122-123).[4] After being quick-frozen in a loose form (R. 83), some of the vegetables are immediately packaged in consumer-size cartons. Normally, however, only a small part of the vegetables (*e.g.*, less than one-third of the 1954 corn crop (R. 24)) are so packaged dur-

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conveyors, steam blanchers, washers, steam and abrasion peelers, cutters, silkers, and packaging machinery (R. 15-18, 90, 108).

[4] Professor Ornsdorff, the Government's expert witness, detailed the effects of blanching and freezing: "[L]ife is a function of enzymes" (R. 126) and a harvested vegetable is still a living organism which will continue to ripen or even reproduce until its enzymes are killed (R. 126, 129, 140, 146). By killing the enzymes, blanching destroys all plant life and thus arrests the natural causes of deterioration (R. 122, 127). Freezing also causes structural changes and softens the vegetables (R. 139, 143). After blanching and freezing, perishability from natural causes should be stopped (R. 129) and any deterioration thereafter is due mainly to largely controllable physical factors, such as temperature and humidity (R. 141, 145). Oregon's expert witness agreed generally with that testimony (R. 157-159).

ing the season. The balance is packed in bulk containers and placed in cold storage to be repackaged after the season ends (R. 17, 25, 52).

Although it is desirable to dispose of the frozen vegetables as soon as possible after the season ends, in order to avoid the risk of dehydration during storage, the lack of firm orders for the vegetables—a large part of which are packaged under "buyers' labels" (R. 82, 112)—often causes the repackaging operations to be spread out over many months (R. 89). Thus, although the active corn season extends only from August 1 to October 10, the repackaging of bulk-frozen corn continued, for the 1954 crop, until the following May 22; for the 1953 crop, until August 1; and for the 1952 crop, until February 1 (R. 66). The active carrot season is from October 15 to December 1, but the repackaging of carrots continues throughout December (*ibid.*).

In addition to repackaging the bulk-frozen corn and carrots as such, Oregon also prepares and packages, from October into January, a vegetable mix consisting of corn, carrots, lima beans, string beans, and peas (R. 66). The vegetables other than corn and carrots it purchases, already frozen in bulk, from frozen food processors in Oregon, Washington, and California (R. 19). All of the vegetable mix is packaged under "buyers' labels" (R. 112).

Oregon employes some 300 production workers to process corn during the active corn season, but retains only 20 after the end of the season to sort, inspect, grade, and repackage the bulk-frozen corn (R. 19). It employs 40 production workers to handle

carrots during the active carrot season, but retains only 20 after the season to repackage the bulk-frozen carrots and prepare the vegetable mix (R. 20).

2. In 1952 and 1953, Oregon, claiming exemptions under §§ 7(b)(3) and 7(c) of the Fair Labor Standards Act,[5] did not pay overtime rates for work performed during selected weeks (R. 23, 36), and it is stipulated that Oregon will continue that practice unless enjoined in this action (R. 23-24). Some of the weeks were during the active harvesting season when Oregon was engaged in processing and freezing freshly-harvested vegetables and immediately packaging them in either consumer-size packages or bulk containers. It was conceded at the trial that Oregon was entitled to the exemptions during those weeks (R. 30-32, 67). During other weeks for which exemptions were claimed, however, Oregon was engaged only in storing, repackaging, and mixing vegetables previously frozen and stored in bulk. It was contended by the Government that those post-seasonal operations did not constitute part of the "first processing" within the meaning of § 7(c) and the § 7(b)(3) determination, and hence that Oregon was not entitled to the exemptions when so engaged (R. 27).

3. The district court held that the repackaging of the bulk-frozen vegetables was not a "new process" but a "reasonable continuation and a part of 'the first

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[5] Oregon also claimed an exemption under § 13(a)(10), contending that the Administrator's definition of the "area of production" for purposes of that section was invalid (R. 28-29). After this Court upheld the definition in *Mitchell* v. *Budd*, 350 U.S. 473, the district court denied the claim (R. 56-58), and it has apparently now been abandoned.

processing of perishable or seasonal fresh fruits or vegetables' ", which was not completed until the vegetables were "packaged in consumer size packages even though delayed" (R. 62, 68). That followed from its view that "the first process is completed," within the "spirit and intent" of the Act, only when "there is a finished product for market" (R. 62-63). It accordingly held that Oregon was entitled to the exemptions when engaged in the post-seasonal storing, repackaging and mixing operations (R. 49-72).[*]

The court of appeals affirmed, holding in its first opinion that the question turned upon "factual issues" and that the "facts support the conclusion adopted" (R. 175-177). In an opinion denying rehearing, the court explained its first opinion as holding simply that the district court's "interpretation of the clause of the statute relating to 'first processing,' in view of the facts found in the record, was correct" (R. 178). The court further stated, however, that blanching and freezing did not amount to "processing" at all (R. 180).

SUMMARY OF ARGUMENT

1. The exemption under § 7(c) of the Fair Labor Standards Act for the "first processing of * * *

[*] The opinion, after upholding the § 7(c) exemption, stated that "it is not necessary to decide" whether the § 7(b)(3) exemption applies (R. 63), but the claim of the additional exemption was in fact upheld in the conclusions of law (Concl. VII, R. 70). Apparently the court had initially assumed, erroneously (see R. 36, 18), either that the exemptions were not cumulative or that Oregon had not claimed exemption for more than a total of 11 weeks.

perishable or seasonal fresh fruits or vegetables" does not apply to Oregon's repackaging, after the season ends, of the vegetables which it has previously frozen and stored in bulk containers. Whether such repackaging should be viewed as part of a single "processing" which began with the initial freezing operations or as a separate operation not included in the "first processing" turns on the purposes of the statutory exemption. From the fact that the exemption applies only to "perishable or seasonal" produce, it is apparent that its underlying purpose was to afford relief from the maximum-hours limitations when use of overtime is made essential by the "seasonal" influx or the "perishability" of the produce. That purpose is confirmed by the statement of the sponsor of the provision that certain "seasonal commodities" should be exempt during the "peak season" (83 Cong. Rec. 7419) and has been recognized in numerous decisions. *E.g.*, *McComb* v. *Hunt Foods, Inc.*, 167 F.2d 905, 906-907 (C.A. 9). Construed in the light of that purpose, "first processing" should be interpreted as terminating when the vegetables have been processed to a preservable state and there is a break in the operations, for the subsequent operations are free of the seasonal or perishability pressures that are the very reason for the exemption.

In this case, the "first processing", as so interpreted, ends when the vegetables have been frozen and stored in bulk containers, for they are then no longer "perishable" and the subsequent operations may be spread out over many months. Although there is some risk of dehydration if frozen vegetables

are stored too long, such deterioration is of a very different order, in terms of urgency, than that implied by the term "perishable" as used in the statute, and does not present the compelling necessity for overtime that Congress recognized as justifying an exemption from the premium-pay requirements.

That interpretation of "first processing" is adopted in the regulations (29 C.F.R. (1958 Supp.) 780.51 (b)(1)) and has been consistently followed by the Administrator since at least 1943. Being fully consistent with the statute and having the added force given to such interpretations by § 16(c) of the 1949 amendments to the Act (63 Stat. 920), that interpretation should be controlling. *E.g., Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16-17.

2. Even if Oregon were entitled to an exemption under § 7(c) when repackaging its own previously-frozen vegetables, it would not be entitled to the exemption when mixing and packaging vegetables previously frozen by other processors. Since that is the only operation performed by Oregon on such vegetables, it cannot be treated as a part of some earlier "processing" (29 C.F.R. (1958 Supp.) 780.51 (b)(2)), and, standing alone, it is clearly neither the "first" processing nor performed on "fresh" vegetables.

3. Section 7(b)(3) of the Act provides an additional 14-week exemption from the overtime provisions for industries determined by the Administrator to be of a "seasonal nature", and the Administrator has made such a finding for the "first processing * * * of perishable or seasonal fresh fruits and vege-

tables." 5 Fed. Reg. 3167. Even if, contrary to our view, the Administrator's definition of "first processing" were not controlling on the interpretation of § 7(c), it would seem necessarily to govern the meaning of that term as used in the Administrator's own industry determination under § 7(b)(3). See, *e.g.*, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414. Oregon would not, therefore, be entitled to the additional exemption under § 7(b)(3) even if it were held to be entitled to the § 7(c) exemption.

ARGUMENT

I

The Exemption From the Overtime Requirements of the Fair Labor Standards Act Given By Section 7(c) To Employers Engaged in the "First Processing of * * * Perishable or Seasonal Fresh Fruits or Vegetables" Does Not Apply To An Employer Engaged in the Post-Seasonal Repackaging of Vegetables Which It Has Previously Frozen and Stored in Bulk Containers.

A. Introduction.

The primary question in this case is whether Oregon is entitled to an exemption under § 7(c) of the Fair Labor Standards Act when engaged only in repackaging vegetables which it has itself previously frozen and stored in bulk containers. If it is not entitled to that exemption, it follows that it is likewise not entitled to the additional exemption under § 7(b)(3) or to either exemption when it is also engaged in mixing and packaging vegetables

previously frozen by others.[7] These questions (Points II and III, *infra*) need be separately considered only if it is held that Oregon is exempt under § 7(c) when repackaging its own previously-frozen vegetables.

Since the exemption under § 7(c) is granted only for the "first processing" of perishable or seasonal fresh fruits or vegetables, the controlling question is whether the initial freezing and bulk-packaging and the subsequent repackaging are to be viewed as but steps in a single, though suspended, "processing" or as two separate processings.[8] If viewed as sepa-

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[7] Obviously, also, if the repackaging itself is not exempt, the "storing" of the frozen vegetables preparatory to such repackaging is not exempt.

[8] The suggestion of the court below, in denying rehearing, that blanching and freezing do not amount to "processing" at all (R. 180) is difficult to understand. Unless they are "processing" they cannot be "first processing," which is the very basis upon which the exemption was allowed. The court's assertion that freezing is not "processing in common acceptance of the term or in trade usage" (R. 180) is contradicted not only by the trade journals and Government publications (*e.g.*, the industry's own directory is entitled *Directory of Frozen Food Processors* and the *1954 Census of Manufacturers* lists the industry under "frozen food processing establishments") but by the repeated references of respondents' president and counsel, throughout the trial, to blanching and freezing as "processing" (R. 80, 85, 86, 90, 91, 96, 97, 104).

It is clear in any event that freezing is "processing," not only in the common acceptance of the term, but also in the sense that it significantly changes the form of the commodity. There can be no question that blanching (which kills the enzymes and "partially cooks" the vegetables (R. 17, 98, 122-124)) and freezing (which "disorganizes the tissues, renders them permeable, and liberates enzymes"

rate, the initial freezing and bulk-packaging is undeniably the "first" processing and the repackaging is at most a "secondary" processing incidental to Oregon's marketing operations, which, moreover, is performed not on "fresh" vegetables but on frozen ones. If, on the other hand, the repackaging is viewed as an integral, though delayed, part of a single "processing" which began with the receipt of the freshly-harvested crops, it is by definition part of the "first" processing, which, in turn, is performed on "fresh" vegetables.

Viewing the phrase "first processing" in isolation, there is perhaps little to choose between the two characterizations of the repackaging operations. On the one hand, there is an obvious break in the processing when the vegetables, having been frozen and packed in bulk containers, come to rest, for an indefinite period, in the cold storage rooms. On the

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(Cruess, *Commercial Fruit and Vegetable Products* 765 (1948); R. 139, 143)) change the natural state of the vegetables just as surely as "bulking" does tobacco. See *Mitchell* v. *Budd*, 350 U.S. 473, 481. The complexity of the freezing operations (R. 16-18) and the extensive equipment required (see note 3, *supra*) likewise preclude a characterization of freezing as something less than processing. Cf. *Budd*, *supra*, at 475. Finally, in *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49, 53-54, this Court, although holding that frozen foods were within an exemption from the Interstate Commerce Act for "agricultural * * * commodities (not including manufactured products thereof)", expressly recognized that frozen foods "have gone through a processing stage" although short of transformation into a "manufactured" product. See also 72 Stat. 568 amending the Interstate Commerce Act to exclude frozen foods from that exemption.

other hand, packaging would admittedly be part of the first processing if performed immediately after the freezing, and it may with some reason be said that it should make no difference that that step is simply postponed until after the seasonal pressures are over.

That ambiguity disappears, however, when "first processing" is viewed in the light of the purposes sought to be served by the exemption. We shall show, both from the terms of the statute itself and from its legislative history, that the purpose of the exemption was simply to afford relief from the maximum-hour limitations when the use of overtime is made unavoidable by the "seasonal" influx or the "perishability" of the produce and hence that the exemption ends when the processor has put the vegetables in a preservable form and stored them for further processing at its convenience. Additionally, we shall show that that interpretation has been consistently followed by the Administrator and that the administrative interpretation should be controlling to resolve any doubts.

B. THE PURPOSE OF THE EXEMPTION IS TO RELIEVE SEASONAL PRESSURES AND IT DOES NOT APPLY TO POST-SEASONAL OPERATIONS WHICH MAY BE PERFORMED AT THE EMPLOYER'S CONVENIENCE.

1. For the purposes of the exemption it is unnecessary, we believe, to go further than the language of the exemption itself, which is granted not for all "first processing" but only for the first processing of "perishable or seasonal" fresh fruits or vegetables. Admittedly, that limitation does not conclude the

question as a matter of syntax, since, as noted above, Oregon's processing does *start* with "perishable or seasonal" produce and, if the repackaging is deemed part of a single unitary processing, it necessarily qualifies for the exemption. The limitation does, however, afford the key to the purposes of the exemption and thus to whether the repackaging should be viewed as simply a "part" of the initial processing or as a separate operation.

That which distinguishes "perishable or seasonal" vegetables from others is that their initial processing when received from the farm inevitably, or nearly so, requires the use of overtime: "perishable" vegetables, because prompt processing is essential for preservation, and "seasonal" vegetables, because the heavy influx during the short but long-houred harvesting season must be handled. Therein, we submit, lies the reason for the exemption, and § 7(c) should therefore be construed as intended to exempt neither more nor less than the overtime required by seasonal or perishability pressures.

2. Although meagre, the legislative history of § 7 (c) fully supports the inferences of purpose to be drawn from its language. The subsection was offered as a Committee amendment on the floor of the House by Representative Norton, who explained simply that "discussion of the bill in the Labor Committee" had revealed that "there are certain seasonal commodities that should at least be exempted from the hours provision of the bill during what we call the peak season." 83 Cong. Rec. 7419. That statement, as well as the reasons that were advanced at

the committee hearings for such an exemption,[9] demonstrate, we believe, that it was intended by § 7(c) to exempt only overtime "during * * * the peak season."

Equally significant, particularly in light of the district court's suggestion that "first processing" is not completed until "there is a finished product for market" (R. 62-63), is what Congress did not do. As a substitute for the "first processing" exemption

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[9] See, *e.g.*, the statement of the National Canners Association on the practical necessity for overtime operations during the harvesting season (*Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200*, Pt. 3, 75th Cong., 1st Sess., p. 1133):

> Despite spaced plantings, the total period in which perishable agricultural commodities may be harvested is limited by the seasonal factors of spring frosts, summer heat, humidity, rainfall, relative day and night temperatures, etc. In many cases, the total harvesting period can cover only a few hundred hours. Cool weather retards and a hot spell accelerates the tonnage which will ripen on a given day. When the fruit or vegetable has reached proper maturity, the farmer, in order to obtain the maximum economic return, must harvest it at full ripeness and maturity before rapid deterioration sets in. * * * Products such as peas or sweet corn must be harvested [and] processed within a few hours or else deterioration causes either a substantial reduction in value or complete loss. * * * In addition, the high and low points of tonnage harvested and delivered by the farmer are intermittent. Sometimes a period of cool weather will result in complete retardation of maturity and permit the harvesting of only enough raw commodity to permit a few hours' daily work. A period of hot weather will produce a glut requiring fairly long hours.

proposed by Representative Norton, Representative Coffee offered an amendment that would have extended the exemption to the "processing * * *, distributing or handling" of seasonal or perishable agricultural products. 83 Cong. Rec. 7421. The very reason given for that proposal, which would have included all operations leading to the final marketable product, was that such operations would not necessarily be included in the narrower exemption for "first" processing (*ibid.*). The rejection of that proposal in favor of the exemption limited to "first processing" (83 Cong. Rec. 7423) precludes, we submit, the district court's interpretation of the provision as exempting all steps leading to a "finished product for market."[10] The line must rather be drawn in terms of the seasonal or perishability pressures the exemption was designed to alleviate.

3. From both the statute and its legislative history, therefore, we think it clear, as the lower courts have

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[10] That interpretation is further precluded by the striking contrast between the form of the exemption here—simply the "first processing of * * * fruits or vegetables"—and the exemptions in § 7(c) itself for the "first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products" and the "processing of sugar beets, sugar-beet molasses, sugar-cane, or maple sap, into sugar (but not refined sugar) or into sirup." Those provisions define the exemption primarily in terms of the end product and, indeed, expressly include the further processing of previously-processed commodities (*e.g.*, "cream" or "sugar-beet molasses"). Compare also § 13(a)(5), in which Congress expressly exempted not only "processing" but also "marketing * * * storing, or distributing" of certain seafoods.

consistently recognized in other factual situations,[11] that the purpose of the exemption was to permit the use of nonpremium overtime when required by the "seasonal" influx or the "perishability" of the produce—that is, by natural factors beyond the control of the processor. Viewed in the light of that purpose, "first processing" should be interpreted as

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[11] See *McComb* v. *Hunt Foods, Inc.*, 167 F. 2d 905, 906-907 (C. A. 9), certiorari denied, 335 U.S. 845, commenting on the very provision involved here:

> The Wage and Hour Division has recognized the clear intendment of the statute in this language:
>
> "The purpose of Section 7(c), as shown by the legislative debates, was to relieve processors and packers of seasonal agricultural commodities from the burden of paying overtime compensation during those peak seasons of the year when large fluctuating quantities of perishable agricultural commodities move from the farms to the processing establishments, which commodities must be processed as soon as they arrive." Wage and Hour Release No. 1892, Jan. 25, 1943.

For other cases recognizing, in differing contexts, the "seasonal" purposes of the various § 7(c) exemptions, see *Walling* v. *Swift & Co.*, 131 F.2d 249, 251 (C.A. 7) ("It was the purpose of Congress, in granting this exemption, to enable the employer to avoid the burden of time and one-half for overtime in those seasonal or peak periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control."); *Hendricks* v. *DiGiorgio Fruit Corp.*, 49 F.Supp. 573, 575 (N.D. Cal.) ("The legislative history of the Act shows that Congress realized that perishable or seasonal fresh fruits or vegetables must be processed when they reach the proper stage and that such stage depends upon natural factors which man cannot control."); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F.Supp. 393, 401-402 (S.D. Cal.); *Shain* v. *Armour & Co.*, 50 F.Supp. 907, 911-912 (W.D. Ky.); cf. *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 271.

terminating when the vegetables have been processed to a preservable state and there is a break in the processing operations. The subsequent operations are free of the seasonal or perishability pressures that are the very reason for the exemption, and the rate at which they are performed is subject to the control of the employer.

4. That interpretation of "first processing" clearly requires that Oregon be denied the exemption for its repackaging operations. When the vegetables have been frozen and stored in bulk at zero temperatures, they are no longer "perishable", in the sense that the word is used in the statute, and the initial processing has been halted. The rate at which the repackaging is done after the season ends is governed not by natural factors but by the employer's convenience and the receipt of orders. That there does not then exist the necessity for overtime that justifies the exemption is convincingly shown by Oregon's drastic reduction of its work force at the end of the active corn season from 300 to 20 employees. When, therefore, upon receipt of orders, Oregon withdraws the previously "processed" vegetables from storage and regrades, reinspects, and repackages them, it should be treated as being engaged in "secondary" processing incidental to its marketing operations and not in the "first processing" necessary to preserve fresh fruits and vegetables from spoilage.

It is no doubt true that, even though largely controllable by storage conditions (R. 144-145), there is always some risk of dehydration if frozen vegetables are stored too long. But that frozen foods

might therefore be described as "perishable" for some purposes does not mean that they are "perishable" in the sense that that term is used in the statute. In the first place, "perishable" as a description of "fresh fruits and vegetables" connotes, primarily at least, deterioration from bacteriological or enzymatic causes rather than from dehydration. More importantly, it implies deterioration of a very different order in terms of urgency than that caused by the long-term dehydration of frozen vegetables. While fresh corn must be processed within a matter of hours, frozen corn at most needs to be removed from storage only within a matter of months.[12] The legislative judgment that would exempt the former operation from the maximum-hours limitation hardly implies also a judgment that would exempt the latter. Rather, the "perishability" of frozen vegetables is clearly not so great as to preclude the regularization of hours by the employment of an adequate work force and does not present the compelling necessity for overtime[13] that Congress has recognized as justi-

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[12] Oregon's repackaging of its 1954 corn crop continued for over 7 months; of its 1953 crop, for over 9 months (R. 66).

[13] Avoidance of overtime is, in fact, one of the very advantages claimed by advocates of the bulk-packaging procedure. See, *e.g.*, *Bulk Bins Save on Frozen Food Storage*, Western Canner & Packer, v. 49, No. 10, p. 211 (Oct. 1957): "From bulk storage the packer can package as orders and labels are received. Premium labor can be avoided, and packaging can be done by the regular crew after the rush season has passed."

fying an exemption from the premium-pay requirements.[14]

C. THE CONSISTENT ADMINISTRATIVE INTERPRETATION OF THE ACT IS CONTROLLING.

Even were the statute and its legislative history less clear, the question in this case would be foreclosed by the express administrative interpretation of "first processing." The interpretative regulations issued by the Administrator of the Wage and Hour Division now provide (29 C.F.R. (1958 Supp.) 780.51(b)(1)):

> An employer who commences processing operations on a perishable commodity to which the exemption in section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including by-product operations, which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable. * * *

[14] It may be noted additionally that the risk of dehydration is alleviated not by the repackaging as such but only by the final sale and consumption of the vegetables. So long as the vegetables are to be stored, the evidence is that they are less subject to dehydration when stored in bulk than when stored in consumer packages (R. 135). Thus the rate of repackaging is controlled not by perishability but by the receipt of orders. Indeed, the possibility of partial dehydration would, if anything, seem to require that repackaging be postponed until orders are received, so that the dehydrated vegetables can be removed during regrading.

Since Oregon's post-seasonal repackaging operations are neither part of a "continuous series of operations" commencing with the initial processing nor performed while the vegetables "remain perishable," the administrative interpretation of "first processing", if accepted, would clearly preclude their exemption.

The above interpretation was first formally announced, in substantially its present form, in Wage and Hour Release No. 1892, January 25, 1943, and has been outstanding, and consistently applied, ever since.[15] Thus, not only does the regulation represent the considered interpretation of the Act by the agency charged with its enforcement, but it also bears the "unique imprimatur" of Congressional approval given to the then-outstanding rulings by § 16 (c) of the Fair Labor Standards Act Amendments of 1949, 63 Stat. 920. *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, 837 (C. A. 5). That section provided in substance that any rulings or interpretations of the Administrator in effect on the date of the 1949 Act "shall remain in effect" if not inconsistent with that Act.[16] Relying on that provision, this Court has consistently given peculiar weight to inter-

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[15] See also 17 Fed. Reg. 9615 (Oct. 1952), construing "first processing" as limited to "the initial operation which changes the form of the whole fresh fruit or vegetable and all operations on its main portions when performed in a single process as a continuous series of operations throughout which the commodity remains perishable * * *."

[16] See the discussion of the effect of a similar provision of the House bill at *Hearings before House Committee on Education and Labor on H. R. 2033*, 81st Cong., 1st Sess., p. 978.

pretative rulings antedating the 1949 Act. *E.g.*, *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16-17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270; *Steiner* v. *Mitchell*, 350 U. S. 247, 255.[17] The settled administrative interpretation here, dating back at least to 1943 and fully supported both by the purposes of the Act and by the requirement that exemptions from the Fair Labor Standards Act be "narrowly construed",[18] should, therefore, be controlling.

II

The Section 7(c) Exemption Does Not Apply To An Employer Engaged in Mixing and Packaging Vegetables Previously Frozen and Bulk-Packaged By Other Processors.

If Oregon is not exempt under § 7(c) when engaged in repackaging its own previously-frozen vegetables, it necessarily follows that it is not exempt when engaged in mixing and packaging vegetables previously frozen by other processors and purchased

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[17] Of the numerous proposals made to amend §§ 7(c) and 7(c)(3) in the 1949 Act (see *Hearings, supra*, note 16, at 90-93, 625-634, 776-803, 850-871, 947-978, 1055-1060, 1165-1182, 1245-1248; *Hearings before Subcommittee of Senate Committee on Labor and Public Welfare on S. 58, etc.*, 81st Cong., 1st Sess., pp. 627-792, 1069-1074, 1144-1146), only one minor change, not relevant here, was adopted (see H. Rep. No. 1453, 81st Cong., 1st Sess., p. 19), and one of the arguments made against such amendments was that they would upset the established administrative interpretations of the exemptions (*Hearings, supra*, note 16, at 855).

[18] *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 617; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 296.

by Oregon.[19] Even if it should be held that Oregon is exempt when repackaging its own vegetables, however, it would nevertheless not be exempt when mixing and packaging vegetables frozen by others.

Oregon's repackaging operations, since they are by themselves neither the "first" operation nor performed on "fresh" vegetables, could be exempt, if at all, only by being viewed as a continuation of Oregon's initial freezing operations. In the case of the lima beans, string beans, and peas used in the vegetable mix, however, Oregon has not performed any previous operations of which their mixing and packaging could be deemed a "part." Since the mixing and packaging is the *only* operation performed on those vegetables, that operation must necessarily stand on its own feet for purposes of the exemption and as such it clearly is neither the first processing (since other processors have already prepared, frozen, and packed the vegetables) nor performed on fresh vegetables.[20] The processing of such vegetables is undeniably broken—and hence the *first* processing completed—when they have been frozen and packed

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[19] The vegetable mix packaged and sold by Oregon consists about 60% of corn and carrots previously frozen by it and about 40% of lima beans, string beans, and peas purchased, already frozen and packed in bulk containers, from other processors (R. 19, 65).

[20] "Fresh" vegetables, as interpreted by the Administrator since the adoption of the Act, are those "in their raw and natural state as distinguished from them after they are 'processed', canned or dried." Interpretive Bulletin No. 14, p. 9, 35 W.H.M. 351, 359.

in bulk by the first processor and sold and shipped to Oregon.[21]

Finally, the interpretive regulations under § 7(c) clearly establish that Oregon's mixing and packaging operations cannot be "tacked" to the operations of the original processor so as to be treated as part of a single "processing" which started with the fresh vegetables (29 C.F.R. (1958 Supp.) 780.51(b)(2)):

> Where first processing operations are performed at one place of employment on a commodity named in section 7(c), and further processing operations on the processed commodity are then performed at another place of employment, such further processing operations are not part of the "first processing" of the named commodity which commenced at the first place of employment, but comprise a separate process. * * *

III

Neither the Repackaging Nor the Mixing Operations Are Within the Additional Exemption Provided By Section 7(b)(3).

Section 7(b)(3) of the Act grants a 14-week exemption from the overtime provisions, up to 12 hours a day and 56 hours a week, for industries "found

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[21] See *Domenico v. Mitchell*, 232 F. 2d 112 (C. A. 10). In that case, the employer, engaged primarily in packing and distributing fresh vegetables purchased from nearby farmers, also purchased "mountain grown" vegetables which had been previously packed by others. Work performed by the employer on the latter vegetables (handling from one car to another, re-icing the cars, and repacking broken crates) was held not to be within the § 7(c) exemption for "first processing".

by the Administrator to be of a seasonal nature."[22] The Administrator has determined that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" within the meaning of § 7(b)(3), also ruling that the exemption thereby granted is cumulative to that given by § 7(c).[23] 5 Fed. Reg. 3167 (set forth at R. 44-49). Since that industry determination is cast in language identical to that of the § 7(c) exemption, the reasons given above for the inapplicability of the § 7(c) exemption to the repackaging and mixing operations are equally applicable here.

In addition, however, the § 7(b)(3) exemption would not be available even if it were held that § 7(c) exemption did include either or both of those operations. To uphold the claimed § 7(c) exemption it would be necessary to reject the consistent administrative interpretation of that section (*supra*, pp. 22-23, 26). But even if not controlling on the meaning of § 7(c), the Administrator's definition of the term "first processing" would seem necessarily to govern the meaning of that term as used in the

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[22] "Industry" is defined in § 3(h) to include "a trade, business, industry, or branch thereof." By thus defining "industry" in flexible terms, Congress provided the means for limiting exemptions to branches or portions of an industry which are actually seasonal while excluding the non-seasonal "trade" or "business" parts of the industry. See *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, 839 (C. A. 5).

[23] The § 7(c) exemption contains no hours limitation. Where both exemptions are applicable, the employer may select the weeks to which to apply each.

Administrator's own industry determination under § 7(b)(3). See, *e.g.*, *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, 834-836 (C. A. 5). In construing an administrative ruling, the administrative interpretation is the "ultimate criterion" (*Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414), and a rejection of the Administrator's interpretation of § 7(c) would not require, or permit, a rejection of the clear intent of the Administrator's determination under § 7(b)(3).[24]

[24] That determination must, moreover, be read in the light of § 7(b)(3) which authorizes exemption only upon a finding that the industry is of a "seasonal nature." An interpretation of the determination as exempting Oregon's post-seasonal repackaging and mixing operations would thus be inconsistent with the clear purposes of the statute to limit the relief granted to "seasonal" operations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES P. MITCHELL, SECRETARY OF LABOR,
PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Respondents are satisfied with appellants statement of the second and third "Questions Presented" but differ with the language in the first question, particularly: "stores them until after the season has ended and thereafter packages them." Actually part of the bulk stored vegetables are "repackaged" during the harvest season (R 154) and as such is first processing.

We would like that thought expressed in the question and suggest the following:

Whether a continuation of repackaging, after harvest season, of previously frozen and bulk packaged

vegetables continues to be a part of "first processing of * * * fresh fruit and vegetables" under Section 7 (c) of the Fair Labor Standards Act so as to exempt the processor from the overtime requirement of the Act.

Or as otherwise, but less succinctly stated:

Whether a frozen food processor who freezes vegetables and packs part of them in consumer-packages and the balance in bulk containers a portion of which is repacked in consumer's packages during harvest season, as time permits, and the balance following the harvest season, whether the latter continues to be "first processing of * * * fresh fruits and vegetables" so as to be exempt under Section 7 (c) of the Fair Labor Standards Act from the overtime requirements of the Act.

SUMMARY OF ARGUMENT

It is respondents' position that all steps required from the receipt of the vegetables to finally packing in retail packages constitutes one single and indivisible process. That the temporary storing of frozen vegetables in bulk is only one step in this process and all of the operations constitute "First Processing" under Sec. 7 (c) of the Act.

That the vegetables are perishable even though frozen and that there exists definite pressure to package the vegetables in retail packs as early as possible.

That the storage is not an end to the process but only part of the "first processing."

That respondents are entitled to the exemptions under Sec. 7 (c) of the Act in mixing vegetables. The

addition of beans and peas to corn and carrots does not change the essential characteristic of the process. The operation is still a processing of corn and carrots.

Respondents are entitled to the exemption under Sec. 7 (b) (3) in mixing vegetables for the reason that the exemption is broader than Sec. 7 (c) and embraces all processing and is not limited to first processing. Sec. 7. (b) (3) is an exemption to the branch of the industry which has been found by the Administrator to be of a seasonal nature and is applicable to that branch of the industry and not to a portion of its activities.

Even if Oregon were not entitled to the exemption under 7 (c) in the mixing of corn and carrots with beans and peas, which we feel it clearly is, it would still be entitled to the exemptions under Sec. 7 (b) (3) as being part of a branch of an industry found by the Administrator to be of a seasonal nature.

OREGON RELIES UPON THE FOLLOWING PROPOSITIONS IN SUPPORT OF ITS CLAIM TO THE EXEMPTIONS UNDER SECTIONS 7 (c) AND 7 (b) (3) OF THE ACT:

(1) The purpose of the exemptions under 7 (c) and 7 (b) (3) of the Act is to afford relief to farmers in marketing their products.

(2) Appellant concedes that all steps from the receipt of the vegetables to putting it into the retail package constitutes "First Processing" if done in a continuous, uninterrupted flow.

(3) All activity is one continuous process and the storage in bulk containers is only one, but a necessary, step in the continuous processes.

(4) The facts found by the trial court are entitled to great weight and should not be overturned in the absence of a finding that they are clearly erroneous.

(5) Section 7 (b) (3) of the Act applies to all operations of a branch of an industry found to be seasonal by the Administrator and is available during every part of the year.

(6) The result of appellants position would be to deny respondents the full number of weeks which the Act grants, cutting them from 28 weeks to nine or ten weeks. The cost of production is reflected in the price paid to farmers.

(7) The main purpose of the processing is to "get it into the retail package as quickly as possible" (R 91-2); also during peak season (R 100); a first processing ends only when the product is finally placed in retail packages.

(8) Putting the corn and carrots in 64 cu. ft. bins is not "packaging" and thus packaging from bin to retail packages is in fact the first "packaging" and not a "repackaging", although it is spoken of in those terms in the record by all parties.

(9) All steps in Ore-Ida are considered to be first processing. Actually there is more "processing" in french fried potatoes than in frozen corn on the cob or mixed vegetables.

(10) The exemption should not be whittled away by fine distinctions, the full purpose of the Act should be preserved for the benefit of the farmers.

(11) Grading and inspecting of product is conceded to be part of first processing (Ap. B. 4-5, C.C.).

(12) Placing corn in 64 cu. ft. bins after freezing

is not an interruption in the process but is rather a necessary step in preserving the corn until the packaging crew can pack it in consumer size packages, at which point the corn and carrots are then, but only then, "processed."

(13) When the lower court stated that the corn and carrots were not "processed" it was simply distinguishing the operation from one of "manufacturing."

(14) The pressure to get corn and carrots into consumer size packages continues throughout the operation.

(15) Mixing peas, string beans, and lima beans with corn and carrots does not change the essential characteristic of the operation. It is merely a method of packaging.

(16) Findings of the Administrator of the Act defining first processing was based on:

Plants which receive for packing 30 per cent or more of the total annual volume of fresh fruit or vegetables in a period or periods aggregating not more than 14 work weeks (R 45). The corn is received from August 1 to October 10 or ten weeks (R 16) and the carrots are received from October 15 to December 1, or six weeks (R 18).

ARGUMENT

I

"FIRST PROCESSING" INCLUDES ALL OPERATIONS FROM RECEIPT OF CORN AND CARROTS TO FINAL PACKAGING IN RETAIL PACKAGES.

The exemption under Section 7 (c) applies to

"First Processing of, or in canning or packing perishable or seasonal fresh fruit or vegetables." There can be no doubt that we are dealing with fresh vegetables. The only question is "What is First Processing?"

The government concedes that all the steps of the operation from receiving to packaging in retail packages constitute "First Processing" (R 67) Br. 8, if done in a continuous process, but they claim the storing in bulk breaks the continuous process and that all activities thereafter are something other than "First Process."

The purpose and manner of temporarily storing in bulk is important.

It is impossible to package into retail packs 5,450,000 pounds of corn (R 24) from August 1st to October 10th (R 19). 1,513,877 pounds were so packed (R 24). The balance was placed in either 64 cubic feet neophene lined pallets or 50 pound cardboard containers and put in cold storage (R 25). When the packaging facilities are sufficient to handle more than the daily run during harvest season, the corn is brought out of cold storage and packed in consumer size packages (R 154). This process is continued after the fresh corn run is over and until all of it is packaged (R 24 and 66). It is the very nature of the corn and carrots that makes this an economic necessity. Time and speed continue to be essential as Mr. Grigg testified.[1]

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[1] "That's the theory, get it into the package as fast as you can" (R. 82) and "Well, our attempt is to get them into this retail form as fast as we can regardless of whether we have an order or not" (R 83) and "* * * so you bring in a large

It would be ideal if respondent could pack all the corn in retail packages as it is frozen (R 104). But it would be impractical to have enough packaging machines to do this, if it were possible (R 105).

The term "repackaging" has been used throughout this case but it is important to visualize the exact procedure. Accurately speaking the corn and carrots are not "packaged" when they are placed in the 64 cubic feet bulk bins or carrots in 50 pound bulk cartons. Therefore, when the vegetables are taken out and put in retail packages, that is actually the first "packaging" of the corn and carrots. The term "repackaging" simply distinguishes it from the operation of packaging directly off the freeze line or tunnel. The steps for corn are best described in the pre-trial order (R 16 and 17) and the same is true of carrots (R 18).

It is interesting to note that the government concedes that the operations of Ore-Ida Potato Products Inc. are entitled to both exemptions, Section 7 (c) and 7 (b) (3).[2] Ore-Ida is an affiliated corporation of Ore-

influx of product and during the harvest season, and then you work it through as fast as you can." (R. 104) "Q. Now, during the active corn season is any of this corn taken off the lines and put into cold storage particularly during the day shift and if there is a slack period during the night shift, is that brought back out? A. Yeah. We fill up every minute's time we can. Say, if something happened in the field so the corn wasn't flowing in at night for processing if there is any spare time at all, why, we bring it back out and we pack it then."

[2] "Ore-Ida does not bulk freeze and store its potato products for subsequent repacking or mixing, but immediately packages them into consumer-size cartons as a part of the initial freezing operation during the active processing season. Therefore, no question is raised on this appeal as to the appli-

gon, leasing one-half of the same plant, using two of the four freeze tunnels while Oregon uses the other two (R 15). Ore-Ida produces french fried potatoes, hash brown potatoes and french cut potatoes and shredded potato patties (R 14). The basic operations are similar if not identical with those of Oregon. The vegetables are received, washed, peeled, cut, blanched, diced or shredded, and then frozen. The only distinction that can be made lies in the fact that all the potato products are packed in consumer size packages at the end of the freezing tunnels while about two-thirds of the corn and part of the carrots are first placed in bulk containers and then packaged from the bulk containers during and following the harvest season rather than directly from the freezing tunnels.

It is also clear that grading and inspecting the corn and carrots constitute necessary steps and are clearly part of "First Processing." The appellant so advised the Court of Appeals.[3]

A basic question or pivotal factor in determining whether First Process includes all steps from receipt of corn and carrots to packaging them in retail pack-

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cability of the Section 7 (b) (3) and Section 7 (c) exemptions to Ore-Ida's potato operations." (App. Br. Court of Appeals, Page 5)

[3] "Concededly, all the operations involved in converting these fresh vegetables (corn, carrots and potatoes) into frozen food products are exempt. They include inspecting, weighing, sorting, washing, trimming or cutting, blanching, cooling, quick-freezing, packing in bulk or packing into retail or consumer-size packages, when such retail packaging is performed immediately following and as a part of the freezing process." (App. Br. Court of Appeals, Pages 4 and 5).

ages is simply this: "Is the placing of frozen corn and carrots in bulk containers an end result in itself or an end of a process or operation and therefore the end of 'First Processing'?" Or "Is it an integral part of a series of operations terminating with a frozen food in consumer-size package?" If the former, then First Process could conceivably end there, but if the latter, First Process continues until the corn or carrots are finally placed in such consumer size packages.

The only reason or excuse for respondents' operation is to freeze vegetables and prepare them for market. This purpose cannot be accomplished until the product is put into consumer packages. There would be no economic justification to freeze corn and carrots and put them in bulk storage.

But here, the entire effort and purpose is to get these products into consumer packages and sold. When they are processed to that point they are processed but they do not reach that point until placed in consumer packages.

That is the end result and all steps preceding it are necessary. If it is necessary to bulk store the corn and carrots it is only a delay in the final finished product.

Those pallets which are pulled out of zero storage during the corn run (R 81) must of necessity be classed as First Process as it is done during and as part of the corn freezing operation.

Appellants concede that packaging from bulk storage during harvest season is First Process. "It was conceded at the trial that Oregon was entitled to the exemptions during those weeks," (harvest season). (App. Br. 8).

If repackaging from bulk containers during harvest season is First Processing why is the same operation immediately following the harvest season not First Processing?

A part of each days run is packaged directly from the freeze tunnel; the balance is stored in bulk containers (R 25). As time permits during the harvest season. the bulk containers are brought out and the product packaged in consumer size packages (R 25). It is this repackaging that was conceded to be First Processing at the trial.

If repackaging during the active corn harvest season is First Processing a continuation of this same repackaging must likewise be First Processing. There is no difference in the operations, but simply a continuation of it, until the entire crop is packaged.

ARGUMENT

II

The Section 7 (c) Exemption Applies to Mixing of Vegetables As It Is A Continuation of The Packaging Which is First Processing. The Addition of Other Vegetables Is Not A New Or Different Process But Only A Means of Packing The Corn and Peas.

Obviously, if the packaging of corn and carrots from the bulk bins is a continuation of first processing during the harvest season it continues to be first processing following the harvest season. If Oregon is entitled to the exemptions under Sec. 7 (c) for packaging after the harvest season, the addition of other vegetables does not make it a different process. If the corn and carrots were packed as succotash it would

add nothing new and would be simply another method of packing. Does the addition of frozen peas and beans make this another process? We do not feel it does. It is similar to the addition of brandy for fortifying wine. "It was clearly an operation incidental and necessary to defendants' exempt operation and thus fell within the exemption."[4]

Sixty per cent of the mixed vegetables are corn and carrots and forty per cent are peas and beans. Seventy-seven per cent of the carrots processed goes into the vegetable mix (R 24).

All the reasons why Sec. 7 (c) apply to the repacking of corn and carrots following the harvest season apply also to the mixing of vegetables during the same time.

The fact that first processing is started in one plant and finished in another, even separately owned, or dividing the operations between two processors seems to be irrelevant.[5]

ARGUMENT

III

Section 7 (b) (3) Is An "Industry" Exemption And Not An "Operation" Exemption. Respondents Are Engaged In A Branch of an Industry Found By The Administrator

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[4] *Hendricks* v. *De Georgio Fruit Corporation* 49 F. Supp. 573-576.

[5] Whether dehydrating one part of the apple and making of juice and pomace from other parts of the same apple is accomplished on a continuous production line under one roof, or is accomplished by dividing the practically simultaneous operations between two adjacent producers, would seem to be irrelevant." *McComb* v. *Hunt Foods*, 167 F. (2) 905.

To Be Seasonal In Nature, And Are Entitled To This Exemption Independent of Section 7 (c) of The Act.

The First and Second argument of appellant deals with Sec. 7 (c) but the third (Ap. Br. 26) deals with Sec. 7 (b) (3) claiming that Section is not applicable to "repackaging" nor to "mixing." We assume that they mean those operations that are performed after the active corn or carrot freezing season — corn from August 1 to October 10 and carrots October 15 to December 1. We make that assumption for the reason that it has been conceded that all operations performed during the active freezing period is exempt. "It was conceded at the trial that Oregon was entitled to the exemptions during those weeks."

The Administrator has found that this is a branch of an industry which is seasonal in nature. There is no requirement in Section 7 (b) (3) of the Act that the particular activity must be "first processing."[*]

The exemption under 7 (b) (3) is in no way dependent upon Sec. 7 (c) and have different requirements. The latter is "First Processing" and the former is "Seasonality" and is "broader in scope than Section 7 (c). It is not restricted to first processing of such fruits or vegetables." *Domenico* v. *Mitchell*, 232 F. 2d 112.

Furthermore the definition of seasonality fits

[*] "The Test under this particular subsection is not the operation of the individual employer, but that of the industry as a whole. If the industry is seasonal in nature, the benefit of such finding extends to every employer * * *" *Wyatt* v. *Holtville Alfalfa Mills, Inc.* 106 F. Supp. 624, 634. See also *Domenico* v. *Mitchell* 232 F (2) 112 and *Hendricks* v. *Di Georgio Fruit Corp.* 40 F. Supp. 573.

respondents' operation completely. Corn is received from August 1 to October 10, a period of nine to ten weeks — carrots from October 15 to December 1, a period of six weeks.[7]

The fact that the government agrees that Sec. 7 (b) (3) is applicable to respondents' operation during the harvest season can be based only upon a finding that the operation is a branch of an industry found by the Administrator to be seasonal in nature. If the nature of the business is seasonal, the exemption is available. The exemption may be claimed during any part of the year and is not dependent upon "First Processing."

To reason otherwise is to obliterate the distinction between the two exemptions and in effect deny one. In this case, the government seeks to deny both exemptions to the "repackaging" and "mixing" after the freezing operation has terminated. If it is held that these operations do not constitute "first processing" the respondents are still entitled to the 7 (b) (3) exemption. We again point out that all operations of Ore-Ida are conceded to be entitled to each exemption, *i. e.* Sec. 7 (c) and 7 (b) (3) and such exemptions are not interdependent or mutually exclusive. While the Court denied the exemption of Sec. 7 (c) of the Act to "mountain grown" vegetables, they did grant

[7] Regulation promulgated by Administrator being Part 526, Industries of a Seasonal Nature, June 1953, Section 526.3 "The exemption for an industry of a seasonal nature is applicable to * * * an industry which * * * receives * * * fifty per cent or more of the annual volume in a period or periods amounting in the aggregate to not more than 14 work weeks."

exemption under Sec. 7 (b) (3) to them in *Domenico* v. *Mitchell (Supra)*.*

Even if Oregon were not entitled to the exemptions under Sec. 7 (c), it is clear that they are entitled to those under 7 (b) (3) as to mixing operation. The Administrator has found that the packing, handling, and preparing in their raw or natural state of perishables or seasonal fresh fruit and vegetables *is a branch of an industry and of a seasonal nature* within the meaning of Sec. 7 (b) (3) of the Act.

We are dealing with a branch of an industry and must look at the total branch to determine whether the exemption applies. There is no doubt that Oregon deals with perishable and seasonal vegetables, to-wit: corn and carrots. Also that they are "received for packing 50 per cent or more * * * in a period of * * * not more than 14 work weeks."

Further that the operation is "* * * during an annually recurring season or seasons of six weeks to six months and cease first processing * * * operations during the remainder of the year * * *" (R 45 and 46).

It is the total operation of this branch of the industry that determines whether Sec. 7 (b) (3) applies, not a branch of the branch. The Administrator did not and could not examine a small portion of the operation to determine whether the exemption applied or

* "Indeed, if it limited the definition of a seasonable industry with respect to fresh vegetables to first processing it would be in direct contravention to the mandate of Section 7 (b) (3) making it the duty of the Administrator to define a seasonable industry."

not. It is an industry exemption or at least a "branch of an industry" exemption. If the exemption applies to the industry, or a branch thereof, it is available to that industry or branch thereof. It is an "industry" exemption as opposed to an "operation" exemption such as we find in Sec. 7 (c). If the distinction is not followed, it would effectively do away with Sec. 7 (b) (3), unless the particular operation also qualified under Sec. 7 (c).

The Administrator was told by Congress to determine what industry or branch of industry was seasonal and to accord to such industry the partial exemption of 14 weeks, up to 12 hours a day and 56 hours per week.

The industry we are concerned with is the frozen food industry. The branch is the "packing, handling and preparing in their raw or natural state of seasonal fresh fruits and vegetables" (R 45).

If Oregon is engaged in such a branch of industry it is entitled to the exemption under 7 (b) (3) of the Act. Since the Administrator has so found and since the government concedes that Oregon is entitled to this exemption generally, it clearly establishes it to be a branch of an industry of a seasonal nature.

Respondent feels that this mixing is first processing or "an operation incidental and necessary to (Oregon's) exempt operations and thus fell within the exemption."[9] or failing that, that the "mixing" operation is part of a "branch of an industry found by the

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[9] *Hendricks* v. *De Georgio Fruit Corporation* 49 F. Supp. 573.

Administrator to be of a seasonal nature" and therefore entitled to the exemption by Sec. 7 (b) (3) as an "industry" exemption rather than an "operation" exemption.

Certainly the mixing of corn and carrots with beans and peas cannot be classified as a "branch of an industry" and thus be segregated for this purpose of determining the exemption under Sec. 7 (b) (3) of the Act. It is an integral part of an operation; the sum total of all operations constitute the "branch of an industry."

We apologize to the Court for discussing so many of the facts but our only reason for doing so is our conviction that the application of Sec. 7 (c) and 7 (b) (3) are factual matters. The able trial court heard the facts and made his findings on the facts so found. It is impossible to determine whether the exemptions are available without an application of the Act to the facts.[10]

[10] *Mitchell v. Oregon Frozen Foods Company* 145 F. Supp. 157, 162-163 and 254 F. (2) 116 and 264 F. (2) 599. That is why the Court of Appeals says "We take our stand firmly upon the findings of fact and the able opinion of the District Judge which clearly interprets the statute in the light of the facts so found * * * However, an interpretation cannot be made without facts. The interpretation placed upon the facts relating to the fruit and vegetable industry by a Judge fully cognizant of the problems of farmers and orchardists in an agricultural area are entitled to high respect."

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 33

JAMES P. MITCHELL, Secretary of Labor, *Petitioner*,

v.

OREGON FROZEN FOODS CO., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF FROZEN FOOD PACKERS

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BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF FROZEN FOOD PACKERS

INTRODUCTION

Reference to the opinions of the courts below, the statement of jurisdiction, and the pertinent provisions of the statute and rulings involved, are omitted pursuant to the provisions of Rule 42(5) of this Court.

QUESTIONS PRESENTED

1. Whether a frozen food packer who conducts operations which concededly qualify him as a member of an industry of a seasonal nature and who therefore is entitled under Section 7(b)(3) of the Fair Labor Standards Act, to an exemption from the overtime requirements of such Act, is nevertheless *not* qualified for the exemption when performing any of the following operations:

A. The packaging for market, subsequent to the harvesting season, of vegetables previously frozen and stored in bulk by the packer during such season, in the course of which it was impracticable to package the vegetables for market.

B. The packaging for market subsequent to the harvesting season, of a mixture of vegetables previously frozen and stored in bulk during such season, in part by such packer and in part by others, where it was impracticable to prepare the mixture except by using such previously frozen vegetables.

2. Whether the packaging and mixing of the bulk-frozen vegetables is the "first processing, . . . or packing of . . . perishable or seasonal fresh fruits or vegetables" within the meaning of the exemption from overtime requirements under Section 7(c) of the Act.

STATEMENT

A. The Interest of the National Association of Frozen Food Packers

The National Association of Frozen Food Packers, on whose behalf this brief is filed, is a non-profit trade association whose 125 member companies freeze approximately 75% of the total frozen fruit and vege-

table production in the United States. These member companies operate in the East, South, Middle West, Southwest, and the entire Pacific Coast, including the Northwest. More than half the membership engages solely in freezing operations. Oregon Frozen Foods Company is a member of the Association.

The questions involved in the *Oregon Frozen Foods* case are of direct and immediate concern to the members of the Association engaged in the freezing of fruits and vegetables. The interest of Oregon Frozen Foods Company in these questions differs from the interest of other Association members engaged in the freezing of fruits and vegetables only in the respect that an enforcement proceeding was instituted against Oregon. The widespread effect upon the frozen food industry of a reversal of the decision of the Court of Appeals in this case will appear from the Argument. The consent of the Solicitor General of the United States and of Oregon Frozen Foods Company to the filing of this brief has been obtained, as evidenced by letters from both parties submitted to the Clerk of this Court.

B. Facts

It is conceded by the Government that Oregon is entitled to both the seasonal industry exemption under Section 7(b)(3) of the Act and the "first processing" exemption under Section 7(c), during those weeks when freshly harvested vegetables are frozen and immediately packed in market-size packages or stored in bulk containers (Br. p. 8). It is only the packaging of vegetables which have been previously frozen and bulk-stored by Oregon or purchased in bulk from other processors, which is involved in this case.

The Statement of the Case in the brief for the Secretary of Labor requires the following additions and exceptions:

1. The basic exemption involved is that for seasonal industries under Section 7(b)(3) of the Fair Labor Standards Act, not the "first processing" exemption under Section 7(c), as the brief for the Government indicates. Availability of the former for operations in a seasonal industry is not dependent upon qualification for the latter, contrary to the Government's position. This point is developed in the Argument, Part 1.

2. Among the Agreed Facts incorporated in the Pretrial Order of the District Court were the following, as sumarized by the Court:

> "After being frozen, as much as possible of both corn and carrots is placed in consumer-sized packages and put in cold storage. At the peak of the season, due to limited packaging facilities, only part of each day's products can be packaged at that time. The excess is put in large bulk containers and kept in cold storage. At the end of the peak season the products are resorted and repackaged in consumer-size packages." (R. 52.)

The District Court found that ". . . due to the rush of harvest it is not practicable nor economically sound to package the entire pack from the harvest into consumer-sized packages as required by the defendant's market, and that it is necessary to bulk freeze a part of the corn and carrots coming into defendant's plant in the course of the harvest. That the latter repackaging after the rush of the harvest into consumer-size packages is a reasonable continuation of a part of 'the first processing of perishable or seasonal fresh fruits and vegetables.'." (R. 67-68.)

3. The characterization as "repackaging" of the packaging operations of Oregon subsequent to bulk freezing, is inaccurate, since Oregon for the first time "packaged" the corn and carrots which it had frozen, and the mixed vegetables which it had purchased, after their storage in bulk. In common commercial usage, a "package" of an article is one which is ready for market. The purchased components of Oregon's mixed vegetables were, therefore, not "packaged" by Oregon until they were packed together in the end form of the product, i.e., mixed vegetables for the consumer market, just as the corn and carrots previously frozen in bulk by Oregon were not "packaged" until they were placed in the market-size containers and cartons.

SUMMARY OF ARGUMENT

1. Oregon is engaged, as a packer of frozen vegetables, in an industry of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and is therefore entitled to the 14 weeks exemption provided by that section with respect to all of its operations of freezing and packaging seasonal vegetables. If Oregon were, as contended by the Government, engaged in packing operations in addition to those of an industry of a seasonal nature, it would nevertheless be entitled to the Section 7(b)(3) exemption with respect to all its operations which reasonably relate to the handling of seasonal fruits and vegetables. The Section 7(b)(3) exemption extends to every employer in an industry of a seasonal nature, even though the particular employer's operations may not be seasonal. E.g., *Domenico* v. *Mitchell*, 232 F. 2d 112 (C.A. 10). Since the freezing by Oregon of corn and carrots in bulk is admittedly first processing under the Government's theory of the case (Br. 25-26),

Oregon is entitled to the Section 7(b)(3) exemption for its operations with respect to the corn and carrots which it freezes in bulk and later packages in market-size containers, as well as for the packaging of mixed vegetables, some of which (corn and carrots) it has previously frozen itself and some of which (peas, green beans, baby lima beans) are purchased in bulk-frozen form from other freezers. The packaging operations in question are an essential part of Oregon's handling and packing of the seasonal commodities. Consequently, in conducting them, Oregon is engaged in an industry of a seasonal nature.

The Administrator of the Wages and Hours Division has provided by regulation that he will find an industry to be of a seasonal nature if it "engages in the handling, extracting, or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year not substantially greater than six months . . ." (29 C.F.R. (1958 Supp.) 526.3); and has determined that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry of a seasonal nature within the meaning of Section 7(b)(3)." (5 Fed. Reg. 3167). The Government contends that the term "first processing", as used in the determination under Section 7(b)(3) just quoted, has the meaning of that term as used in the exemption under Section 7(c), which is available for employers "engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits and vegetables." It seeks to deprive Oregon of the Section 7(b)(3) exemption with respect to its packaging of previously bulk-frozen vegetables on the ground that such operations are not "first processing." Even if

such operations were not first processing, however, the construction thus placed on the Act and administrative rulings is arbitrary and unreasonable, since the operations in question are clearly a part of the packing of seasonal commodities and therefore qualify Oregon as a member of an industry of a seasonal nature. Section 7(b)(3) is not restricted to "first processing." *Domenico* v. *Mitchell*, 232 F. 2d 112, 115 (C.A. 10).

2. The packaging by Oregon of corn and carrots previously frozen in bulk by it is "the first processing of, . . . or packing," of fresh fruits or vegetables within the meaning of Section 7(c). An administrative regulation (29 C.F.R. (1958 Supp.) 780.51(b)(1)) which purports to restrict the meaning of the quoted statutory language to operations which "are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable," is inconsistent with the statutory policy of protection to growers of fresh fruits and vegetables, which underlies the Section 7(c) exemption. *McComb* v. *Hunt Foods*, 167 F. 2d 905 (C.A. 9).

The exemption applies to the processing of certain commodities which are described as "perishable or seasonal." The purpose of Congress can be achieved only by reading the exempting language as applicable to all operations upon such commodities culminating in the final processing of the product. The beginning of further processing, such as cooking a frozen vegetable for use in a frozen dinner, is the point at which "first processing" should be regarded as completed, if full effect is to be given to that term. There is nothing in the exempting provision which requires that the operations in question be continuous, or that these be completed within a particular period of time, or that

the product remain "perishable" throughout. The term "perishable," moreover, logically includes the frozen product and is so defined in Section 1 of the Perishable Agricultural Commodities Act (46 Stat. 531, 7 U.S.C. 499 a *et seq.*)

3. As a practical matter, the small margin of profit in the industry would tend to reduce the volume of fresh fruits and vegetables contracted for and purchased for freezing, if the packaging of bulk-frozen commodities were not exempt under Sections 7(b)(3) and 7(c), in view of the low profit margin in the industry as indicated by the *Quarterly Report for Manufacturing Corporations*, Fourth Quarter 1958, and First Quarter, 1959, published by the Federal Trade Commission and the Securities and Exchange Commission (pages 15 and 21, respectively). It is not economically feasible to provide the necessary machinery to process all commodities frozen during the harvest season (R. 90, 105). The producer, whom the statute seeks to protect, would suffer the loss resulting from substantial curtailment of freezing operations. E.g., *Walling* v. *California Preserving Co., Inc.*, 74 F. Supp. 182 (N.D. Cal.).

4. The packaging by Oregon of vegetables purchased in bulk-frozen form from others is a part of the process of packing mixed vegetables and, as such, qualifies for the Section 7(c) exemption. The mixed vegetables form a substantial segment of the frozen vegetable pack, as shown by *Frozen Food Pack Statistics*, 1958 (Part 2 — Vegetables) published by the National Association of Frozen Food Packers (pages 8, 9, 11, 13, 15, 17, 21). The corn and carrots bulk-frozen and later packaged as the major components of the mixed vegetable product are not harvested during the same period

(R. 66); the peas, green beans, and limas which are used in the product, are obtained by Oregon at distances of 200 to 400 airline miles from Oregon's freezing plant, as is apparent from an inspection, on a map of the Northwestern portion of the United States, of the location of the plant and the supplying areas specified in the Pretrial Order (R. 19). Since fresh vegetables must be frozen promptly to obtain an acceptable product, the commodities used in mixed vegetables are not available to Oregon for that product unless they have been bulk frozen.[1]

It is evident that the packing of mixed vegetables would have to be discontinued by Oregon if the use of pre-frozen commodities were prevented by the necessity for payment of overtime for packaging operations. The problems created by variations in harvesting times and by the distances which some components of the product must be transported, can be overcome only by bulk freezing for later packaging. Obviously, these problems, by their very nature, are not peculiar to Oregon's operations.

The statute readily lends itself, as has been shown, to an interpretation which will be consistent with the purpose of the exemption and, it is submitted, should be so construed.

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[1] *The Freezing Preservation of Foods*, Tressler & Evers, 3rd Ed., 1957, pp. 340-343.

ARGUMENT

I.

A FROZEN FOOD PACKER MAY BE ENTITLED TO THE "SEASONAL INDUSTRY" EXEMPTION UNDER SECTION 7(b)(3) OF THE FAIR LABOR STANDARDS ACT REGARDLESS OF HIS STATUS WITH RESPECT TO THE SECTION 7(c) EXEMPTION FOR EMPLOYERS ENGAGED IN THE "FIRST PROCESSING, . . . OR PACKING . . . OF PERISHABLE OR SEASONAL FRESH FRUITS OR VEGETABLES"

The Brief for the Secretary of Labor presents the case as though the basic determination to be made were whether Oregon's operations entitle it to the exemption under Section 7(c) of the Act as an employer "engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits and vegetables." The brief refers to the broader exemption under Section 7(b)(3) which is applicable to *all* employers engaged in an industry found by the administrator to be of a seasonal nature, as an "additional exemption" (Br. 2, 5). It is stated in the introduction to the argument of the Government that—

> "The primary question in this case is whether Oregon is entitled to an exemption under Section 7(c) of the Fair Labor Standards Act when engaged only in repackaging vegetables which it has itself previously frozen and stored in bulk containers. If it is not entitled to that exemption, it follows that it is not entitled to the additional exemption under Section 7(b)(3) or to either exemption when it is also engaged in mixing and packaging vegetables previously frozen by others." (Br. 12-13.)

The essential basis for the quoted statement is the Administrator's interpretation of the term "first process-

ing" as being restricted to "a continuous series of operations" with no break in continuity.[2]

This view of the effect of the Section 7(b)(3) and Section 7(c) exemptions is unsupported by the text of the statute or the court decisions, and is not a necessary or reasonable construction of the Administrator's own regulations. Clearly, of the two, the broader exemption is the seasonal industry exemption under Section 7(b)(3). The test of whether it is available is not the operation of the individual employer but that of the industry as a whole. "If the industry is seasonal in nature, the benefit of such a finding extends to every employer in that industry, even though the particular employer's operations may not, in fact, be seasonal." *Wyatt* v. *Holtville Alfalfa Mills, Inc.*, 106 F. Supp. 624, 631 (S.D. Cal.); *Hendricks* v. *De Georgio Fruit Corp.*, 49 F. Supp. 573 (N.D. Cal.); *Domenico* v. *Mitchell*, 232 F. 2d 112 (C.A. 10).

The Administrator has determined that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry of a seasonal nature within the meaning of Section 7(b)(3);" 5 Fed. Reg. 3167. (R. 44-49.) Pursuing the argument that a decision as to the applicability of

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[2] The Administrative interpretation is set forth at 29 C.F.R. (1958 Supp.) 780.51(b)(1). It provides:

> "An employer who commences processing operations on a perishable commodity to which the exemption in Section 7(c) for first processing applies, is considered engaged in the first processing of the named commodity throughout each series of operations, including by-product operations, which commence with such initial processing of the named commodity and are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable . . ."

the Section 7(c) exemption is dispositive of the question of entitlement to the Section 7(b)(3) exemption, the brief for the Government, referring to the determination of the Administrator under Section 7(b)(3), states:

> "Since that industry determination is cast in language identical to that of the Section 7(c) exemption, the reasons given above for the inapplicability of the Section 7(c) exemption to the repackaging and mixing operations are equally applicable here." (Br. 27.)

But the determination in question under Section 7(b)(3) cannot reasonably be construed to deprive of the benefit of the "seasonal industry" exemption, an employer whose operations allegedly extend beyond "first processing," if all such operations are a part of the processing of fresh vegetables.

A regulation of the Wage and Hour Division (29 C.F.R. (1958 Supp.) 526.3) establishes standards for determinations by the Administrator of industries of a seasonal nature within the meaning of Section 7(b)(3). The regulation provides that the Administrator will find an industry to be of a seasonal nature if it—

> "Engages in the handling, extracting, or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year not substantially greater than six months, and ceases production, apart from work such as maintenance, clerical, and sales work, in the remainder of the year because of the fact that, owing to climate or other conditions the materials handled, extracted, or processed . . . are not available . . ."

If the determination made by the Administrator that "the first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" is applied in such a manner as to deprive Oregon of the Section 703(b)(3) exemption, as is urged in the brief for the Secretary, the determination is unreasonable and not in accordance with law or with a reasonable construction of the Administrator's own standard.

The argument of the Government amounts to an attempt to designate a portion of the operations of a processor, namely those which the Administrator considers "first processing," as a "branch of an industry," without regard to the fact that all of the processor's operations are an essential part of the packing of seasonal fruits and vegetables.[3] In *Domenico* v. *Mitchell*, 232 F. 2d 112 (C.A. 10) the Court dealt with a contention of the Government similar to that made in the instant proceeding. The Administrator had ruled that "the packing, handling, and preparing in their raw or natural state of perishable or seasonable fresh fruits and vegetables is a branch of an industry and of a seasonal nature within the meaning of Section 7(b)(3) of the Fair Labor Standards Act and Part 526, as amended, of the regulations issued thereunder. 5 Fed. Reg. 3167." Domenico's operations included

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[3] The Government cites *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832 (C.A. 5), in support of its argument that Oregon's delayed packaging operations are not a part of an industry of a seasonal nature. (Br. 27, footnote 22). In that case, however, by-products (cattle feed and molasses for such feed) of citrus fruit processing were involved. The preparation of such by-products from processed citrus is not comparable to the operations of Oregon, all of which are a component part of its vegetable packing operation.

both "first processing" and additional operations which were not "first processing."

The Court held that if the ruling just quoted were applied to limit the definition of a seasonal industry with respect to fresh vegetables to "first processing" it would be in direct contravention of the mandate of Section 7(b)(3) making it the duty of the Administrator to define a "seasonal industry," and that "such a definition must be a reasonable one and must embrace all activities which reasonably relate to the handling of seasonable fruits and vegetables" (232 F. 2d at page 145). Consequently Domenico was entitled to the Section 7(b)(3) exemption for all of his seasonal operations. For like reasons, it is evident that the Administrator may not legally deprive Oregon of any of the benefits of the Section 7(b)(3) exemption on the ground that its operations of packaging and mixing bulk-frozen vegetables are not "first processing." All of Oregon's activities "reasonably relate" to the handling of seasonal fruits and vegetables, as did Domenico's, and are an integral part of the business of packing frozen vegetables.

The important distinction between the scope of the Section 7(b)(3) and Section 7(c) exemptions which has been outlined is not considered in the brief for the Secretary. Nor does the brief attempt to distinguish from the instant case the decision of the Court of Appeals for the Tenth Circuit in the *Domenico* case above cited. Instead, it essays in effect to convince this Court that the scope of the Section 7(b)(3) exemption is governed (1) by the Administrator's determination that "first processing" is a "branch of an industry of a seasonal nature" within the meaning of Section 7(b)(3), and (2) by the Administrator's interpretation

of "first processing" as a "continuous series of operations," which was made under another Section of the Act (Section 7(c)). This approach comports neither with reason nor judicial authority. As the preceding analysis shows, even if the Administrator's interpretation of "first processing" as used in the interpretative regulations under section 7(c) (footnote 2, *supra*) were conclusive under that section, it would not affect the right of Oregon to an exemption under Section 7(b)(3).[4]

II.

A FROZEN FOOD PACKER ENGAGED IN THE PACKAGING OF VEGETABLES WHICH IT HAS PREVIOUSLY FROZEN AND STORED IN BULK IS ENTITLED TO THE EXEMPTION FROM OVERTIME REQUIREMENTS PROVIDED UNDER SECTION 7(c)

A. The Administrative Interpretation

The administrative interpretation by the Administrator of the Wages and Hours Division excludes from "first processing," as used in Section 7(c), all operations other than those which "are performed in the same place of employment as a continuous series of operations during which the commodities remain perishable".[5]

The effect of the decisions below was the rejection of this interpretation as unreasonable in the light of the objectives of the Fair Labor Standards Act. In its Opinion upon Petition for Rehearing the Court of Appeals was emphatic. It stated that "The attempt

[4] The Government assigns as a reason for the inapplicability of the Section 7(b)(3) exemption to the post-seasonal packaging operations of Oregon the fact that the bulk-frozen vegetables are not "fresh" (Br. 25). This argument, too, is wide of the mark. The statutory test for application of Section 7(b)(3) is seasonality, not freshness.

[5] 29 C.F.R. (1958 Supp.) 780.51(b)(1), footnote 2, *supra*.

to import into this field questions relating to business establishments and independent contractors illustrates the fact that the Government agency has never appreciated the purpose of Congress to alleviate the weight of the provisions of the Act in reference to farmers and orchardists" (R. 179). The same court had pointed out, in an earlier case, that the policy of protection to the growers of perishable and seasonal fresh fruits is of as much force as that of the protection of general industrial workers; and that the "hypertechnical" reasoning concerning "exceptions" and "exemptions" has no place in the consideration of cases such as the one at bar. *McComb* v. *Hunt Foods*, 167 F. 2d 905, 906 (C.A. 9), Certiorari denied, 335 U.S. 845.

There is nothing in the statute which requires the Administrator to place upon it the restrictive interpretation of "first processing" which he has adopted. Indeed, to have done so was to ignore the considerations emphasized in the opinion of the Court of Appeals in this case and in the *Hunt Foods* case, to which reference is above made.[6]

It is quite clear that the fact that the Section 7(c) exemption is applicable to "perishable or seasonal fresh fruits and vegetables" does not require that, throughout "first processing" operations the vegetables remain "perishable" or "fresh" in the sense of the Government's position; otherwise packaging of frozen vegetables could not be considered a part of "first processing" even in a "continuous series of operations." Moreover, the Section 7(c) exemption deals with per-

[6] For this reason alone, the Government's contention that the consistent administrative interpretation of the statute should control (Br. 22-24), is not persuasive, for the interpretation of the Administrator ignores a basic policy of the Act.

ishable or seasonal commodities. The only reasonable interpretation of the language of the exempting provision in question, it would seem, is to regard it as a description of the kind of commodities to which it is applicable rather than as a limitation upon the form of the commodities during the period of processing or as a limitation upon the time within which the operation must be completed. If the operation is upon seasonal fruits and vegetables it should qualify for the exemption until the end product has been processed.[7]

The "continuous series" limitation of the regulation departs from the basic concept which is inherent in the statutory language "first processing." The grammatical meaning of "first processing" is "a processing which precedes a further processing." Concededly, it includes packaging of the processed product "if performed immediately after the freezing" (Brief for the Secretary, p. 15); that is, "first processing" may include all operations necessary to make the end product at which the processor is aiming. We think it includes such operations when performed by Oregon.

There is nothing in the administrative interpretation relied upon by the Government, which purports to exclude post-seasonal operations from the benefits of the Section 7(c) exemption. It would, of course, be

[7] Not only is this interpretation logically indicated by the language of the statute and the character of industry operations, but it accords with the definition of "perishable agricultural commodity" in the Perishable Agricultural Commodities Act (46 Stat. 531, 7 U.S.C. 499 a., *et seq.*). Section 1 of that Act provides (§ 4 The term "perishable agricultural commodity" (A) means any of the following, whether or not frozen or packed in ice: Fresh fruits and vegetables of every kind and character . . ."

[8] 29 C.F.R. (1958 Supp.) 780.51(b), 1 (footnote 2, *supra*).

impracticable to enforce such a ruling since the beginning and close of a harvesting season cannot be pinpointed for such a purpose.

Under a literal construction of the interpretation in question, a lag of a day or a week between freezing and packaging, even though harvesting were still in progress, would disqualify the operation for an exemption. It would follow that if, in a given week, employees engaged in a "continuous series of operations" also performed delayed packaging operations, the employer would be entitled to no Section 7(c) exemption at all.[9] Apparently the Government does not so construe the ruling (Br. 8; although some of the language in its argument raises an ambiguity on the point). To do so would nullify the protection for producers which Congress intended to provide by the exempting provision.

Neither the Government's contention, which would exclude post-seasonal packing of previously frozen vegetables, nor that implied in the "continuous series of operations" test, is a necessary or reasonable construction of the statutory language. Both interpretations are avoided by regarding the term "first processing" as a description of an operation which is normal in the course of the employer's business and is necessary to complete the processing of the product being prepared.

The record shows, and the District Court found, that the reason for the delay between bulk freezing and final packaging of corn and carrots is the inability of Oregon

[9] *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, 832 (D.C. Ill.); *Puerto Rico Tobacco Market Co-op* v *McComb*, 181 F. 2d 697 (C.A. 1).

to complete the operation during the harvesting season in years of an abundant crop (R. 52, 67-68, 87, 104-105). In other years it is feasible to complete packaging in "a continuous series of operations." (R. 86-87)

The statement of Representative Norton on the floor of the House of Representatives that "there are certain seasonal commodities that should at least be exempted from the hours provisions of the bill during what we call the 'peak season'" (83 Cong. Rec. 7419) can hardly be regarded as a basis for confining the exemption to operations during the "peak season," in view of the practical limitations of packing facilities, and the evident fact that Representative Norton did not purport to give more than a general idea of the purpose of the exemption.

The only realistic dichotomy to be made in freezing operations is that between those operations which are completed with the final packaging of the frozen product being processed and such further processing as that product may thereafter undergo: for example, the cooking of frozen corn or peas in the manufacture of so-called "prepared frozen foods" such as "TV Dinners" or pot pies; the processing of frozen cherries, by cooking, sweetening, and thickening, for use in cherry pies; or the preparation of strawberry preserves from frozen strawberries.

This is the only kind of processing which can logically be regarded as beyond the scope of "first processing," if the arbitrary results which must follow from application of the Government's theory are to be avoided.

B. Economic Results of the Interpretation Urged by the Government

It seems evident that, if Oregon and other frozen food packers are forced to choose between the payment of overtime for delayed packaging of bulk-frozen fruits and vegetables on the one hand and, on the other, the avoidance of overtime payments by reduction of their volume to that which can be packaged in "a continuous series of operations," many will have to take the latter alternative. The exceedingly small margin of profit in the industry would make this choice seem inevitable.

The Federal Trade Commission and the Securities and Exchange Commission are responsible for the compilation and publication each calendar quarter, of figures indicating the margin of profit, stated as percentage of sales, of manufacturing corporations. For the year 1958 the average profit margin of the food industry, after Federal income taxes, was 2.2%; for the first quarter 1959 the margin was 2.1%. Profits on sales for all manufacturing corporations except newspapers were: in 1958, 4.1%, and in the first quarter of 1959, 4.7%.[10] The intensive competition in the fast developing frozen food industry is particularly conducive to low profits among processors.

The two 14 weeks exemptions under Sections 7(b)(3) and 7(c) account for more than half the year. The severe curtailment of these exemptions with respect to Oregon's necessarily delayed packaging operations, as advocated by the Government, so that time

[10] *Quarterly Financial Report for Manufacturing Corporations.* The figures set forth in the text are taken from the reports for the fourth quarter, 1958 (pp. 6, 15) and the first quarter 1959 (pp. 12, 21).

and one-half would be payable with respect to overtime on such operations, would clearly tend to frustrate the purpose of the exemptions, by discouraging the purchase by Oregon of commodities which could not be packed for market during the harvesting season in a "continuous series of operations." Overtime would have to be paid for delayed packaging operations, thus reducing or even eliminating the already slim margin of profit which the company can expect as a member of the frozen food industry.

Oregon employs some 300 production workers during the harvesting season for corn (R. 19), but, as the District Court found, is unable to carry its processing operations beyond bulk-freezing except in years of low production (R. 67-68, 86-87, 104-105). The alternatives to post-season packaging of this item are, therefore, to contract for and purchase less of the commodity, or to pay overtime for the delayed packaging operations, under the Government's interpretation of Section 7(c). It is not economically feasible to install facilities adequate to completely process all of the commodities frozen during the harvest season (R. 90, 105).

The language of Judge Fee in *Walling* v. *California Conserving Co., Inc.*, 74 F. Supp. 182 (N.D. Cal.), affirmed sub nom *McComb* v. *Hunt Foods*, 167 F. 2d 905 (C.A. 9), certiorari denied, 335 U.S. 845, is pertinent to this situation. Judge Fee stated in his opinion—

> "Modern manufacturing has developed a series of conditions upon which the Fair Labor Standards Act has been sustained. But the products of the soil wait for no man. These must be harvested and processed to a point where they may be preserved in short periods of time, without fail, or

> the farmer or grower will lose all the proceeds of a year of husbandry. If the primary processor, such as the defendant here, is compelled to keep a 40 hour week because the operation is otherwise rendered too expensive and as a result operates on that schedule, a proportion of the apple peelings and cores might become a total loss. Such a loss would fall squarely upon the producer." (74 F. Supp. at pages 183-184).

Likewise if, in the frozen food industry, processors such as Oregon are compelled to curtail their freezing operations to a point where they can be completed by packaging the product during the harvest season, the producer will be the prime sufferer. As we have seen, such a result is not required by Section 7(c) and is inconsistent with its purpose and with a normal reading of its language.

III.

A FROZEN FOOD PACKER IS ENTITLED TO THE SECTION 7(c) EXEMPTION FOR THE OPERATIONS OF MIXING AND PACKAGING VEGETABLES PREVIOUSLY FROZEN IN BULK BY OTHER PACKERS

A. Introduction

We have noted that the term "first processing" can have no sensible meaning in freezing practice except as applied to operations which are completed with the packaging of the product being processed, and which precede further processing into another product: for instance, the cooking of frozen peas for use in so-called "prepared frozen foods," such as frozen dinners, a product of a character entirely different from frozen peas. The use by Oregon in packing mixed vegetables, of bulk frozen lima beans, string beans and peas pur-

chased from others, is not comparable to this concept of "further processing."[11]

Under the Government's interpretation of the statute, Oregon would be entitled to the Section 7(c) exemption for the packing of mixed vegetables if the entire operation were accomplished in its plant without a break in its continuity. The end product is the same when it is made up of some vegetables which have been bulk-frozen by other packers and its processing is not complete until the combination of its various ingredients has been accomplished. It is, therefore, difficult to understand how it can logically be maintained that "first processing" has been completed until the end product—mixed vegetables—has been packed.

Neither the delay in completion of processing operations nor the fact that the operations are completed at a place of employment other than that where the purchased vegetables were bulk-frozen, provides a justification for the exclusion of Oregon's packaging operation from the concept of "first processing." This proposition is illustrated by the case of *McComb* v. *Hunt Foods, Inc.*, 167 F. 2d 905 (C.A. 9), certiorari denied, 335 U.S. 845. Defendant purchased parts of fresh apples consisting of peelings and cores from other manufacturers who had retained and dried the

[11] This concept is consistent with the interpretation by the Department of Agriculture of the Perishable Agricultural Commodities Act (46 Stat. 531, 7 U.S.C. 449 a., et seq.) Thus, it is stated in Form FV-444 (1-17-57), published by the United States Department of Agriculture, Agricultural Marketing Service paragraph 14. that:

> "REMARKS: The mixing of several kinds of sliced, chopped, or diced fruits or vegetables and packaging in cellophane or plastic bags does not change the character as the basic nature of the ingredients have not been changed."

pulp. The purchased peelings and cores were processed by defendant to obtain juice. The vendor of the peelings and cores had "first processed" the apples by removing the peelings and cores and drying the pulp. The defendant's operation was in a different place of employment from that of the vendor and was necessarily subsequent thereto. The Court held, nevertheless, that defendant's operations were within the "first processing" exemption.

Fine distinctions which ignore the purpose of the exemption would be required to differentiate that case from the instant case. If defendant in *Hunt Foods* had purchased the peels and cores in frozen form the better to preserve them for his own operations, would he thereby have become deprived of the Section 7(c) exemption? Or would the exemption have been unavailable for processing of the cores and peels had they been held under refrigeration at temperatures somewhat above freezing levels? Neither freezing nor refrigeration could reasonably be regarded as differentiating Oregon's position from that of the processor of apple peels and cores. In both cases, a processing operation had taken place with respect to the commodity involved, before it came into the hands of Hunt Foods or Oregon.

The Government contends that the bulk-frozen vegetables purchased by Oregon are no longer fresh (Br. 25), and that mixing them with other frozen vegetables is therefore not "first processing." By the same reasoning it could be maintained that the blanching operation which precedes freezing and packing in a continuous operation, deprives the vegetables of their "fresh" character and that the subsequent freezing itself is not "first processing." This the Government does not even contend.

B. Under the Government's Interpretation of the Statute It Would Not be Feasible for Oregon and Other Frozen Food Packers to Market Frozen Mixed Vegetables

1. It seems clear enough, as the courts below held, that the "first processing" of fresh vegetables is not completed until the processor has turned out the end product at which he is aiming. In the case of Oregon's operations the end product, mixed vegetables, cannot be produced until the ingredients are available, some of which cannot be frozen in Oregon's plant.[12] It is necessary that each constituent vegetable be frozen as it is harvested to await the availability of the others, which either are harvested during different periods of the year or, because they are not available locally, cannot be obtained by Oregon with the necessary promptness after harvesting to permit the packing of an acceptable product.

The District Court found that the active corn season for Oregon is from August 1 to October 10 and the active carrot season is from October 15 to December 1 (R. 66). It is evident, therefore, that corn and carrots, which constitute more than 60% of Oregon's pack of mixed vegetables (R. 65), would not be available for freezing in a "continuous series of operations," during the harvest season of either commodity. The fresh corn will not await the harvesting season for carrots. It must be bulk-frozen in advance. It seems fully evident,

[12] Oregon's Mixed vegetable pack is composed of green beans, baby lima beans, carrots, corn and peas, in accordance with the United States Standard for Grades of Frozen Mixed Vegetables, 7 C.F.R. 52.2131-52.2132. The industry volume of this product is shown below under "2". The Standard for Grades is, of course, the basis for government procurement and, under the theory of the case urged on behalf of the Secretary, Oregon could not comply with it, as appears hereinafter.

therefore, that because of the factor of divergence of packing seasons alone, Oregon's mixed vegetable pack would have to be discontinued if the principal constituent commodities were not bulk frozen to await the availability of all the constituents.

2. Even if the variation of production times presented no obstacle, Oregon would be unable to pack mixed vegetables without purchasing bulk-frozen green beans, limas and peas. It is inherent in the nature of fresh vegetables, as authoritative studies have shown, that a fundamental condition of producing an acceptable pack of the frozen commodity is prompt freezing after harvesting.[13] Hence, it is recognized in the industry as essential that freezing be accomplished within six hours after harvest.

Inspection of a map of the extreme northwestern area of the United States reveals that Ontario, Oregon, the site of Oregon's freezing plant, is in the Central portion of Eastern Oregon on the Snake River, which, at Ontario, forms the border between Oregon and Idaho. If harvesting times were the same—as the record shows they are not—corn and carrots could be obtained by Oregon locally for mixing and freezing together, within a reasonable time after harvesting. The green beans, however, are obtained by the processor from Salem, Oregon, an airline distance of some 300 miles from Ontario, beyond the Cascade Range and the Blue Mountains; peas from Walla Walla, Washington, almost two hundred miles distant across the Blue Mountains; and beans from Modesto, California, more than 400 airline miles away. (R. 19.)

[13] *The Freezing Preservation of Foods*, Tressler & Evers, 3rd Ed., 1957, pp. 340-343.

Obviously, if Oregon could obtain these vegetables from local sources, it would do so, if, for no other reason, to reduce hauling charges.

It is, therefore, evident that the only recourse for Oregon, if it is to process an acceptable pack of mixed vegetables, is to obtain peas, green beans, and limas in previously bulk-frozen form. The time required to transport and process these components of the mixture from the producing areas without preservation by freezing, would far exceed that permissible in good industry practice.

The problems faced by Oregon in this respect are not unique in the frozen food industry. Some plants are more favorably situated than others but the widespread necessity for bulk freezing of components of mixed vegetables is clearly reflected in the Frozen Food Pack Statistics published annually by the National Association of Frozen Food Packers. These reports are widely relied upon by industry and interested Government agencies, including the United States Department of Agriculture. The 1958 publication contains the following data showing, in millions of pounds, the United States production in 1958 of the five vegetables used in Oregon's mixed vegetable pack and the amounts of each vegetable frozen in bulk (containers of 50 pounds and over):[14]

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[14] *Frozen Food Pack Statistics*, 1958 (Part 2—Vegetables), National Association of Frozen Food Packers, Washington, D. C., March 31, 1959, pp. 8, 9, 11, 13, 17.

U. S. PRODUCTION DATA—1958

Frozen Commodity	Millions of Pounds Total	Bulk
Green Beans	156.0	18.6
Baby Limas	65.5	7.5
Carrots	53.7	25.9
Cut Corn	111.0	13.3
Green Peas	251.9	36.6

The bulk pack amounted to more than 100 million pounds out of a total of 638 million pounds. This, then, is a substantial portion of the industry's business in the commodities in question. This bulk pack was, of necessity, the source of the mixed vegetables pack for the reasons which have been stated in the case of Oregon. In fact, the major portion of the 1958 bulk pack of 100 million pounds went into combinations of mixed vegetables, mixtures of peas and carrots, and succotash, as shown by the following data:

MIXED FROZEN VEGETABLES—1958

Frozen Commodity	Million Lbs.[15] Total Production	$ Value[16] (Millions)
Mixed Vegetables	37.3	6.7
Peas & Carrots	24.5	3.0
Succotash	8.9	1.5

Nearly 68 million pounds of mixed vegetables, peas and carrots, and succotash were packed in 1958, which

[15] *Frozen Food Pack Statistics*, 1958 (Part 2—Vegetables), National Association of Frozen Food Packers, Washington, D. C., March 31, 1959, pp. 15, 17, 21.

[16] F.O.B. Plant, based upon average quotations, by frozen food packers, *New York Journal of Commerce*, August 24, 1959, p. 5.

had a value of more than eleven million dollars F.O.B. plant. The problems arising from variations in harvesting seasons and inability of packers not in the area of production to freeze one or more of the constituents of the three combinations of vegetables listed in the table, would render impractical the preparation of these products in any substantial amounts if the constituent commodities were not available in bulk-frozen form.

The statute is susceptible of an interpretation which will permit profitable production of these products, as the opinions of the District Court and the Court of Appeals have shown, and as we have emphasised in Point II of the Argument. It is submitted that the interpretation which we have urged is reasonable and practicable and should be adopted by this Court.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 1959.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 33

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents' brief (supported in part by the *amicus curiae* brief) makes two contentions that were not raised in the lower courts and accordingly were not considered in our main brief: (1) that the Administrator's "first processing" determination under § 7(b)(3) is invalid;[1] and (2) that the Government

[1] We concede that a respondent is normally not limited, in defending a judgment in his favor, to the grounds relied upon in the lower courts. In this case, however, the issues were expressly limited, by agreement of the parties and the order of the district court, to those stated in the pretrial order (R. 13–32). Respondents' contentions were there limited to the claim that the post-seasonal operations were part of the "first processing" within the meaning of the § 7(b)(3) determination, and in no way implied a challenge to the validity of that de-

conceded that repackaging is a part of "first processing" when performed during the active harvesting season and it must follow that it is still "first processing" when performed after the season.

I

THE ADMINISTRATOR'S "FIRST PROCESSING" DETERMINATION UNDER § 7(b)(3) IS VALID

Both respondents and the *amicus curiae* contend that the Administrator had no authority to make a "seasonal nature" finding and determination restricted to the "first processing" branch of an industry and that Oregon is "entitled" to the exemption despite the Administrator's findings and determination (Resp. Br. 12–16; Amicus Br. 10–15). That contention is not only contrary to the express statutory terms of § 7(b)(3), but is inconsistent with the legislative intent as evidenced both by the legislative history of its original enactment and by subsequent legislative approval of the long-standing administrative interpretations, regulations and orders issued under § 7(b)(3).

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termination (see R. 29–30), in sharp contrast to respondents' express (now-abandoned) challenge to the validity of the definition of the "area of production" for purposes of § 13(a)(10) (R. 28-29). The pretrial order concluded by providing that "there are no other issues of fact or law except as embodied in this Order," which "will control the course of the trial and shall not be amended except by consent of the parties and the court or by the court to prevent manifest injustice" (R. 32). We doubt that justice requires that respondent be relieved of its stipulation in order to present here for the first time an issue neither raised nor developed in the lower courts.

1. The § 7(b)(3) exemption is not self-executing but applies only to employees "in an industry found *by the Administrator* to be of a seasonal nature" (emphasis added). The only such determination of the Administrator claimed in the lower courts to be applicable here is the determination that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" within the meaning of that section (see Pet. Br. 4, 26–27).[2] Respondents and *amicus curiae* contend, in effect, that that determination is invalid because the Administrator has no authority to define an "industry" in terms of specific operations ("first processing") but must use a more general category. We may pass over the difficulties of respondent's attempt to establish an exemption by challenging the validity of the very determination under which the exemption is claimed (see *Addison* v. *Holly Hill Co.*, 322 U.S. 607),[3] for we think it clear

[2] There is a suggestion in respondents' brief (p. 14) that they are now, for the first time, alternatively claiming exemption under the industry determination for the "packing, handling, and preparing in their raw or natural state of perishable or seasonal fresh fruits and vegetables" (see R. 45). As respondents elsewhere concede (Br. 5), however, freezing is clearly "processing" (see also Pet. Br. 13–14, n. 8) during which the vegetables lose their "raw or natural state." The separate industry determinations for the "first processing and canning" of vegetables (R. 46) and for handling them "in their raw or natural state" (R. 45) are concerned with different operations, and frozen-food processing must qualify, if at all, under the former.

[3] Even if the Administrator's limited determination were invalid, it would not follow that respondents are entitled to any broader exemption. See *Holly Hill*, *supra*, 322 U.S. at 619.

that the determination was fully within the powers of the Administrator.

a. The statute itself indicates that the Administrator was intended to have a considerable measure of discretion and flexibility in defining "industries" for purposes of § 7(b)(3) determinations in order to limit the exemption to particular seasonal *parts* of industries. That is evident from the flexible definition of "industry", in § 3(h), as including a "branch" of a "trade, business, [or] industry." That definition has long been construed, in cases arising under the wage order sections of the Act, as giving the Administrator "a large measure of discretion" in prescribing the industries, or branches, subject to "industry" wage orders, including discretion to limit the application of a wage order to "a particularized section of an industry" and to deal separately and differently with "parts of an industry." See *Southern Garment Manufacturers Ass'n* v. *Fleming,* 122 F. 2d 622, 629–630 (C.A.D.C.); see also *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 149–150; *Columbus & G. Ry. Co.* v. *Adm'r of Wage and Hour Div.,* 126 F. 2d 136, 139 (C.A. 5); *Pearson* v. *Walling,* 138 F. 2d 655, 657 (C. A. 8), certiorari denied, 321 U.S. 775.

The Administrator's discretion to determine what is a seasonal "industry" for purposes of § 7(b)(3) is,

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Since Congress expressly made this exemption dependent upon a finding by the Administrator, it would "fly in the face of Congressional purpose" (*id.* at 620) to assume that the Administrator would have found the whole industry to be seasonal "had he known of its [the limited determination's] invalidity (id. at 619). "It is not for us [the Court] to write a definition. That is the Administrator's duty" (*ibid.*).

we submit, at least as large as his discretion to define "area of production" for purposes of the § 13(a)(10) exemption. What this Court said in *Holly Hill, supra,* is equally applicable here: "In view * * * of the variety of agricultural conditions and industries throughout the country, the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter * * *" (322 U.S. at 614). "The Administrator fulfills his role when he makes a reasoned definition," and although "[e]xperts might disagree over the desirability of one formula rather than another", the Administrator's determination is valid if he "stay[s] within the allowable limits." *Mitchell* v. *Budd,* 350 U.S. 473, 480.[*]

[*] "* * * In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here * * *, the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner." *Gray* v. *Powell,* 314 U.S. 402, 411. There can be no question that the administrative determination here in issue fully conformed with these standards.

As the record shows (R. 44–49), the specific Findings and Determination involved in this case were issued in August 1940, upon application made by "Northwest Canners Association, the Agricultural Producers Labor Committee, the Lakeland Highlands Canning Company, the West Virginia Horticul-

b. If there were ever any reason to doubt the legislative intent to grant the Administrator such discretion and flexibility in applying § 7(b)(3), it has long since been resolved by the legislative acceptance and approval of the long-standing interpretation and practice of the Administrator.

Since the very earliest days of the Act's operation, the Administrator has consistently interpreted the Act as permitting § 7(b)(3) determinations to be limited to specific parts or operations of an industry. In the Administrator's first annual report in 1939, he noted

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tural Society, and sundry other parties" (including the Northwest Frozen Foods Association of Portland, Oregon), and only after a public hearing held on such applications in July 1940 (R. 44–45), following which the presiding officer issued his report in which he determined, among other things, that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature * * *" (R. 46). Notice of the determination was published in the Federal Register (R. 47), inviting any person aggrieved by the determination to file a petition for review within 15 days. No such petitions were filed by any of the industries (or by any member thereof) which had applied for the determination. The only objections came from labor organizations, which raised "a legal issue as to whether or not the exemptions provided under Sections 7(b)(3) and 7(c) * * * were intended to operate concurrently or consecutively with respect to establishments engaged in first processing of * * * perishable or seasonal fresh fruits or vegetables" (R. 48). The Administrator ruled that the § 7(b)(3) exemption was cumulative, "although it might have been construed to be alternative in the original proposition," as Senator Taft pointed out when the Act was undergoing amendment in 1949. (See Hearings before Subcommittee of Senate Committee on Labor and Public Welfare on S. 58, etc., 81st Cong., 1st Sess., p. 640.) In fact, the first administrative interpretation had been that the exemptions were alternative. See Opinion Manual of the General Counsel, Wage and Hour Division, Department of Labor (1940), pp. 94–95.

a case in which, although the industry as a whole did not qualify as seasonal, he had designated "three of the groups of operations as branches of the industry" for purposes of that section.[5] The very determination involved in this case (R. 44–49) was issued in August 1940 and has been outstanding ever since. That and numerous other determinations under § 7(b)(3) designating specified operations or activities were included in a list of such determinations (with a description of the "major operations exempt" under each) furnished to Congress when the 1949 amendments to the Act were under consideration. See Hearings before the House Committee on Education and Labor on H.R. 2033, 81st Cong., 1st Sess., pp. 90–93. Practically all of the 34 determinations on that list defined the "seasonal industry" in terms of operations or activities. As noted in our main brief, although Congress gave extensive attention to the Administrator's interpretation and practice under § 7(b)(3),[6] the 1949 Act made no change in that section but, to the contrary, gave approval by § 16(c) to the then-outstanding interpretations and rulings (see Pet. Br. 23–24).

c. While the Congressional ratification of the long-standing administrative interpretation and practice is, we submit, sufficient to establish the Administrator's authority, it is also amply supported by the legislative history of the original enactment. As clearly evidenced by that history, a construction of

[5] First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, 1939, p. 116.

[6] Pet. Br. 24, n. 17.

§ 7(b)(3) rigidly circumscribing the ability of the Administrator to separate those parts of an "industry" in which use of seasonal overtime is unavoidable from those in which there is no necessity for overtime would undermine the common legislative purpose underlying the several "seasonal" exemptions—namely, to allow for "seasonal activity as to which it is necessary to have quick, speedy work and where it is impractical, if not impossible, to secure labor in the community in large quantities without providing for some exemption of that type" (81 Cong. Rec. 7652).

There seems to be no legislative discussion of the specific language of § 7(b)(3) since it was added to the bill in conference.[7] It was, however, obviously intended to serve the same underlying purpose as the general seasonal exemption provision contained in the Senate bill (§ 6(c)(4), S. 2475, 75th Cong., 1st Sess.), which had spelled out the board's authority in more explicit terms.[8] The debates on the Senate bill clearly

[7] The Conference bill was, for the most part, patterned after the House bill which contained no general seasonal exemption provision (see Conference Report, 83 Cong. Rec. 9246–9255).

[8] The "seasonal" exemption provision of the Senate bill (§ 6(c)) was contained in a much broader general provision authorizing the administrative board to grant exemptions from the minimum wage or overtime requirements for "the employment of employees in any occupation upon terms and conditions prescribed by the Board * * * if the Board finds that the special character or terms of the employment or the limited qualifications of the employees makes such employment justifiable and not inconsistent with the accomplishment of the purposes of such one or more provisions of this Act." The more explicit authority in the Senate bill to grant an overtime exemption for "employment in periods of seasonal or peak activity" (§6(c)(4)) reflects, we think, only the greater specificity of the bill rather than any difference of purpose.

disclose a purpose to give broad flexibility and discretion to the administrative body (in that bill a board rather than an administrator).

The general seasonal exemption provision was closely allied in the legislative deliberations with the more specific "seasonal" exemptions provided by § 7(c), and was motivated by the same "peak season" considerations (discussed in our main brief at pp. 16–19). As explained by Senator Black, the concern was with "the necessity for excluding purely seasonal activities which cannot operate in any other way except by speeding up the work at a particular time" while avoiding extension to "institutions which are not seasonal, and which can extend their work over the year" (81 Cong. Rec. 7810).

The specific "seasonal" exemptions which were subsequently incorporated into § 7(c), and other sections, resulted from the demand that some of the seasonal exemptions should be "statutory, to be written into the law," rather than "discrimiatory, left to the board" (81 Cong. Rec. 7654). Senator La Follette, a member of the Committee, stated the reasons for the Committee's decision to vest an administrative body with discretion "to make exceptions for seasonal industries" rather than attempt to spell out specific statutory exemptions. He explained that the Committee had concluded that it would be "impossible to provide specific exemptions for industries which were seasonal in character * * * without extending the exemptions to many related activities which obviously should" not be exempt, and added that it would be "very diffi-

cult * * * to ascertain on the floor of the Senate what particular processors should be allowed an exemption on the ground that their work is seasonal in character" and which ones should not (81 Cong. Rec. 7883).

Clearly, therefore, the very reason for leaving the § 7(b)(3) exemption to a determination by the Administrator was to permit flexibility in determining what "industries" or "processes" require an exemption and to avoid exemptions so broad as to include work not affected by seasonal pressures. If, in making that determination, the Administrator is to be limited to a rigid definition of "industries" or "branches" of industries, forcing him to exempt operations not affected by seasonal pressures in order to exempt those that are, the very flexibility sought to be achieved would be defeated.

2. The only support for respondents' contention is a dictum in *Domenico* v. *Mitchell,* 232 F. 2d 112, 115 (C.A. 10), that if the determination there involved[9] purported to limit "the definition of a seasonable industry with respect to fresh vegetables to first processing it would be in direct contravention of the mandate of Section 7 (b)(3) making it the duty of the Administrator to define a seasonable industry", since the industry must "embrace all activities which reasonably relate to the handling of seasonable fruits and vegetables."

[9] The determination was for "The packing, handling, and preparing in their raw or natural state of perishable or seasonal fresh fruits and vegetables" (see R. 45 and note 2, *supra*).

The actual holding in that case was not that the specific determination was invalid but that the employer qualified for an exemption under the general "definition" of a seasonable industry contained in the Administrator's regulations. We have set out in the Appendix (*infra*, pp. 16–21) the regulations involved as they were originally issued, as they stood at the time of the *Domenico* decision, and as they have since been amended. From a perusal of those regulations, it is apparent that the Tenth Circuit misapprehended their function and effect.[10] Those regulations are not themselves operative determinations under § 7 (b)(3), but simply prescribe the procedure by which determinations can be sought by interested parties and set forth standards to guide authorized representatives of the Administrator in ruling on such applications. It is only after a specific determination has been sought and made pursuant to those regulations that an exemption under § 7(b)(3) can be claimed. In treating the regulations themselves as self-executing, therefore, the decision in *Domenico* was clearly erroneous.[11] A

[10] A misapprehension which, although apparently shared by respondents (Br. 14–15), is not shared by the *amicus curiae* (Br. 12–13) nor by any other court. That the exemption depends upon a specific finding and determination seemed clear enough to the Fifth Circuit in *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, as well as to the district courts in *Walling* v. *Peacock Corp.*, 58 F. Supp. 80, 883 (E.D. Wis., July 1943), and *Addison* v. *Holly Hill Co.* (S.D. Fla., Jan. 26, 1943, Order on Pleadings, unreported but printed in the Record of the case in this Court (October Term 1943, No. 217), p. 199).

[11] Review of that decision by this Court was not sought because it was thought that the misunderstanding of the effect of the regulations could be overcome by a clarifying amendment. That amendment has since been made (see *infra*, pp. 20–21) and makes clear that the regulations provide no more than

further error of the court (and of respondents) is that the provisions relied upon in *Domenico* (§ 526.3 *infra*, p. 21) state the standards only for determining *seasonality*, without prescribing to what group of operations the standard should be applied, a subject covered by an entirely different provision which leaves to the Administrator a large measure of discretion in defining the "industry" to be included in a determination (§ 526.2(b), *infra*, pp. 16, 20).[12]

It is of course problematical to what extent the court's comment as to the "mandate" of § 7(b)(3) was influenced by its misapprehension of the function of the regulations. Whether it can be so explained or not, however, we submit that the dictum, unsupported by any analysis of the legislative purpose or of the definition of "industry" in § 3(h) of the Act, was plainly erroneous.

II

THIS CASE INVOLVES THE STATUS ONLY OF POST-SEASONAL AND NOT OF IN-SEASONAL REPACKAGING

Respondents seek to draw support for their position that repackaging[13] is part of "first processing" from a

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standards for specific determinations and that the operations to be included in a seasonal industry "shall be limited to those specified by the Administrator in his determination."

[12] Still another error of the court was its assertion that the specific determination "does not purport to state that only such [specified] operations * * * shall constitute a seasonable industry" (232 F. 2d at 715). This is squarely contrary to the express statement at the end of that determination: "The said exemption is applicable only as specified by the aforesaid Findings and Determination" (R. 49).

[13] Respondents quibble over the use of the term "repackaging" to describe the post-seasonal operations (Resp. Br. 7; see also

claim that the Government conceded "that packaging from bulk storage during harvest season" is within first processing (Resp. Br. 9). The statement of the Government's concession is not accurate.[14] In the pretrial order (R. 13–32), there was no suggestion that repackaging was carried on during the harvesting season itself and the issues were accordingly limited to the status of the post-seasonal repackaging operations. Respondents combine that limitation of the issues in the pretrial order with the later isolated testimony of two witnesses that some corn may be repackaged during the season to produce a concession that in-season repackaging is exempt. Obviously, however, those

Amicus Br. 18, 19) is beside the point, for the crucial fact is that the operation, whatever it is called, is not an integral and continuous part of the initial series of operations, within the meaning of the regulations (see Pet. Br. 22–23), and is not within the purpose of the exemption (see Pet. Br. 15–22). The term, which admittedly has been used by all parties throughout this case (Resp. Br. 7), is in any event fully descriptive of the operation of removing the previously bulk-packed vegetables from storage and placing them in new containers. It is also, contrary to the contention of the *amicus curiae* (Br. 5), fully in accord with "common commercial usage." See, *e.g.*, *Bulk Bins Save on Frozen Food Storage*, Western Canner & Packer, vol. 49, No. 10, p. 211 (Oct. 1957); Cruess, *Commercial Fruit and Vegetable Products* (1948), p. 817; Department of Agriculture, *Technology in Food Marketing* (Monograph No. 14, 1952), p. 14.

[14] As is apparent from the context of the quotation, all that the Government conceded was that Oregon was entitled to the exemption for "the weeks * * * during the active harvesting season when Oregon was engaged in processing and freezing freshly-harvested vegetables and immediately packaging them in either consumer-size packages or bulk containers" (Pet. Br. 8).

events show only that the question has never been put in issue in this case, and not that the Government has "conceded" any general principle as to the effect of seasonal repackaging.

In any event, the effect of incidental repackaging during the season poses a very different problem from that of post-seasonal operations limited exclusively to repackaging, and the result might turn on a variety of factors not developed in this record. If, for example, as the cited testimony suggests,[15] such repackaging were done only in order that the workers standing by to handle the fresh corn would not be idle when the flow of fresh corn was for some reason interrupted, there might be good reason for not treating that occasional and insubstantial repackaging as precluding an exemption of overtime required, not for the repackaging operations themselves, but to have the workers on hand to handle the seasonal influx. If, on the other hand, the evidence indicated that the repackaging was being carried on as a substantial or independent operation in itself, with overtime being employed specifically for that purpose, employees engaged in that operation would clearly, we think, not be exempt. Those issues,

[15] R. 100:

Q. Now, during the active corn season is any of this corn taken off the lines and put into cold storage particularly during the day shift and if there is a slack period during the night shift, is that brought back out?

A. Yeah. We fill up every minute's time we can. Say, if something happened in the field so the corn wasn't flowing in at night for processing if there is any spare time at all, why, we bring it back out and we pack it then.

however, are not involved in this case, and on this record there is no occasion to examine them.

Respectfully submitted.

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NOVEMBER 1959.

APPENDIX

1. Pertinent provisions of the Regulations, Part 526 (29 C.F.R. 526), as originally issued on October 20, 1938 (3 F.R. 2534), are as follows:

Section 526.1.—*Statutory provisions.*

* * * * *

Section 526.2.—*Meaning of "industry".*

"Industry" means a trade, business, industry, or branch thereof, or group of industries in which individuals are gainfully employed.

Section 526.3.—*Industry to which the exemption is applicable.*

The exemption for an industry of a seasonal nature is applicable to an industry which both:

(a) Engages in the handling, extracting or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year; and

(b) ceases production, apart from work such as maintenance, repair, clerical and sales work, in the remainder of the year because of the fact that, owing to climate or other natural conditions, the materials handled, extracted, or processed, in the form in which such materials are handled, extracted or processed, are not available in the remainder of the year.

Section 526.4.—*Application for exemption.*

Any industry, or employer, or employer group therein, may make written application to the Administrator for exemption. The application shall state the facts and reasons relied upon to show that the employer or employer group

making application is a part or the whole of an industry which meets the conditions set forth in Section 526.3. Preferential consideration will be given to applications filed by groups or organizations which are deemed to be representative of the interests of a whole industry or branch thereof.

Section 526.5.—*Procedure upon application for exemption.*

Upon consideration of the facts and reasons stated in an application, the Administrator may

(a) without further proceedings deny the application on the ground that it fails to allege facts entitling the industry to an exemption as a seasonal industry; or

(b) may set the application for hearing before the Administrator or his authorized representative; or

(c) may notify the applicant of, and publish in the Federal Register and by general press release, a preliminary determination that a *prima facie* case for the granting of an exemption has been shown. In the event that the Administrator determines that a *prima facie* case for exemption has been shown, the Administrator for 15 days following the publication of his preliminary determination will receive objection to the granting of the exemption and request for hearing from any person interested, including but not limited to employees, employee groups, and employee labor organizations, within the industry claimed to be exempt. Upon receipt of objection and request for hearing, the Administrator will set the application for hearing before the Administrator or an authorized representative. If ~~no objection and~~ request for hearing is received within 15

days, the Administrator will make a finding upon the prima facie case shown upon the application. The exemption shall become effective upon publication of the finding in the Federal Register.

Section 526.6.—*Procedure where application for exemption set for hearing.*

(a) One combined hearing may be held on two or more applications presenting related issues of fact or law.

(b) A notice of the time, place, and scope of a hearing upon an application will be published in the Federal Register and made public by a general press release at least 5 days before the date of such hearing.

(c) All persons interested, including employees, employee groups, employee labor organizations, employers, employer groups, and trade associations, within the industry affected, and designated subordinates of the Administrator, will be afforded an opportunity to present evidence and to be heard.

(d) The Administrator or his authorized representative may cause to be brought before him at such hearing any witness whose testimony he deems material to the matters in issue.

(e) The Administrator or his authorized representative, as the case may be, will make his finding upon the record made at the hearing. If the finding, made by the Administrator himself, is that the industry in question is of a seasonal nature within the meaning of Section 526.3, the exemption shall become effective upon publication of the finding in the Federal Register. If the finding is by an authorized representative of the Administrator, the further procedure set forth in Section 526.7 is applicable.

Section 526.7.—*Petition for review of finding by authorized representative.*

Where hearing is had before an authorized representative of the Administrator any person aggrieved by the finding of such representative may within fifteen days after the action of such representative file a petition with the Administrator requesting a review by the Administrator of the action of the representative upon the record of hearing before the representative. If the request for review is granted, all interested parties will be afforded an opportunity to be heard either in support of, or in opposition to, the matters prayed for in the petition. A notice of the time and place and scope of the hearing will be published in the Federal Register and made public by a general press release at least 5 days before the date of such hearing.

If no such petition for review is filed within 15 days, or if such petition is filed and subsequently is denied by the Administrator, the finding of the authorized representative shall become final. If such finding is that the industry in question is of a seasonal nature within the meaning of Section 526.3, the exemption shall become effective upon publication of the finding in the Federal Register.

If a petition for review is granted and upon hearing the Administrator confirms a finding by the representative that the industry is of a seasonal nature within the meaning of Section 526.3, or if the Administrator, rejecting a finding by the representative to the contrary, finds on the record that the industry is of a seasonal nature within the meaning of Section 526.3, then the exemption shall become effective upon publication of the Administrator's finding in the Federal Register.

* * * * *

2. Pursuant to notice published in 18 F.R. 1044, Section 526.2 of the Regulations was amended by adding to it the following subsection, effective June 29, 1953 (18 F.R. 3063):

> (b) In determining whether the operations for which exemption is sought constitute an industry or a separable branch of an industry, the following factors, among others, may be considered: The extent to which the activity carried on and the products under consideration are distinguishable from other activities and products, the geographical locations of the operations, the comparability of techniques and physical facilities with those found in other situations, the extent of integration with other operations, the extent of segregation of employees performing the operations involved, established classifications in the industry, and any competitive factors involved.

At the same time, Section 526.3 was amended by adding to it an alternative test of seasonality as follows:

> (b) An industry which:
>
> (1) Engages in the handling, preparing, packing or storing of agricultural commodities in their raw or natural state; and
>
> (2) Receives for handling, preparing, packing or storing 50 percent or more of the annual volume in a period or periods amounting in the aggregate to not more than 14 workweeks.

3. Pursuant to notice published in 22 F.R. 8018, Section 526.2 of the Regulations was amended by adding to it the following subsection, effective April 19, 1958 (23 F.R. 2601):

> (c) The operations and activities included within a seasonal industry shall be limited to those specified by the Administrator in his determination.

At the same time, Section 526.3 was amended to read as follows:

Section 526.3.—*Standards for Administrator's determination that an industry is of a seasonal nature.* The exemption provided under section 7(b)(3) shall apply only to those industries which the Administrator has determined to be of a seasonal nature. The Administrator will find an industry to be of a seasonal nature if it:

(a) Engages in the handling, extracting, or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year not substantially greater than six months, and ceases production, apart from work such as maintenance, repair, clerical, and sales work, in the remainder of the year because of the fact that, owing to climate or other natural conditions, the materials handled, extracted, or processed, in the form in which such materials are handled, extracted, or processed, are not available in the remainder of the year; or

(b) Engages in the handling, preparing, packing or storing of agricultural commodities in their raw or natural state, and receives for handling, preparing, packing or storing 50 percent or more of the annual volume in a period or periods amounting in the aggregate to not more than 14 workweeks.

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No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

By a letter from the Clerk of this Court dated December 1, 1959, the Solicitor General was requested to respond to three questions posed by the Court. The questions, and our responses to them, are as follows:

I

Question: Based on the record in this case, does the petitioner accept respondent's contention, elaborated in oral argument, that some of the vegetables which were received during the harvest season were, after freezing, first placed in bulk storage, and later taken out of bulk storage and packaged in consumer-sized packages during the same harvest season?

Although the petitioner has no reason to controvert respondents' assertion that some bulk-stored vegetables were repackaged during the harvest season, the record in this case does not disclose either the relevant circumstances or the extent of any in-seasonal repackaging that may have been done. As explained in our reply brief (pp. 12–15), the Government throughout has challenged only the exemption of the post-seasonal operations, and the status of the in-seasonal operations has never been put in issue. As a result, the stipulations,[1] the findings,[2] the district court's opinion,[3] the court of appeals' opinion,[4] and all the briefs in this case prior to the respondents' brief in this Court, were limited to the facts and status of the post-seasonal repackaging. The only mention of in-seasonal repackaging was in the incidental comments of two witnesses that sometimes, during a lapse in the flow of fresh vegetables, previously-frozen vegetables were withdrawn from storage and repackaged.[5] Not being in issue, however, the

[1] See, *e.g.*, Pretrial Order, R. 17: "After the end of the peak corn season the frozen bulk whole kernel corn is taken from cold storage * * * and packaged in consumer size packages." See also R. 17–18, 19, 25.

[2] R. 66: "The 1954 crop of frozen corn was repackaged after the active season from * * *. Bulk frozen carrots are repackaged after the active season during the month of December."

[3] R. 52: "The Government contends that: 1. The repackaging of the bulk frozen corn and carrots after the active season ends" is not exempt.

[4] R. 176: "The issue on appeal relates to the trial court's holding that the 'repackaging of bulk frozen corn and carrots after the active season ends'" is exempt.

[5] See R. 100 (quoted at Pet. Reply Br. 14, n. 15); R. 154.

point was never developed. Even if that testimony, though immaterial to any of the issues as then framed, were accepted as establishing the fact that some in-seasonal repackaging was done, it is obviously not a complete enough description of the extent and nature of the operations to permit a judgment of the effect of those operations on respondents' right to the exemptions during the harvest season.

II

> *Question:* If the petitioner concedes that such packaging from bulk storage into consumer-sized packages did take place during the harvest season, what is the petitioner's position as to the exemption of these operations under the statute and regulation in issue, and what is the legal or other basis for such position?

It has not heretofore been necessary for the Administrator to adopt an official position on this question. No attempt has been made to enjoin the use of the exemptions in those circumstances, but that is not equivalent to a ruling that there is no violation of the law. The Administrator has neither the personnel nor the appropriations with which to seek out and enjoin every possible violation of the statute, but must instead concentrate on what are thought to be the most important problems or those involving the clearest violations. In this case, for example, the widespread and growing practice in the frozen foods industry of storing frozen vegetables in bulk for repackaging after the season ends made it important to establish whether the overtime exemptions applied to the post-seasonal repackaging operations. The

action was not brought to determine whether on the particular facts of Oregon's operations there were activities engaged in during the active harvest season which made the exemptions unavailable even then, and the failure to challenge Oregon's right to the exemptions during the season in no way implies a "determination" that it was entitled to them. We will, however, in response to the Court's invitation, state our informal views on the question.

As stated in our reply brief (p. 14), the effect of in-seasonal repackaging might turn on a number of factors not developed in this record, such as the extent of the operations (whether merely incidental or a full-scale independent operation), the reasons for engaging in them (whether to utilize workers standing by to handle fresh produce the flow of which is temporarily interrupted, to dispose of some of the crop in order to alleviate over-crowding in the cold-storage rooms, to fill customer's orders, etc.), and the effect of the operations on the use of overtime (whether overtime is used specifically for the repackaging or whether the repackaging is done by workers who have to be kept on hand anyway and would otherwise be idle). In order to deal with the question, therefore, it will be necessary to assume certain facts which do not appear from the record. We will assume those which, from the sparse testimony available, seem most likely to have been the case here: namely, that Oregon repackages vegetables from bulk storage during the harvest season only when, for some reason, there is a temporary interruption in the flow of fresh vegetables and the workers, who must be kept

on duty in any event to handle the fresh vegetables when the flow is resumed, would otherwise be idle; that that repackaging does not cause the use of additional overtime; and that the repackaging then done is relatively insignificant in amount.

On those assumed facts, it is our informal view that that incidental repackaging during the season would not result in a loss of the exemptions. A contrary view would mean that the employer must either allow workers to stand idle or forego the exemptions altogether, a result hardly required by the purposes of the exemption. The controlling consideration in terms of the underlying policy of the statute is that the overtime is required by the seasonal pressures—*i.e.*, to have the workers on hand to handle the influx of fresh produce—and not in order to perform the repackaging; the repackaging is done only to avoid economic waste when the workers are momentarily idled. Those policy considerations afford a compelling reason for construing the statute so that the exemptions otherwise available for the primary activity of processing fresh produce is not defeated by the incidental use of temporarily idled workers for repackaging, and there are at least two possible bases for such a construction.

It can be said, first, that the incidental repackaging is so intimately related in time, space, and function to the primary activity being carried on—the processing of fresh vegetables—as to be an inseparable part of a single integrated operation all of which constitutes "first processing." The time lapse between the freezing and storing and the later repackaging is

only a matter of hours; the repackaging is done by employees then engaged primarily in processing fresh vegetables; and the repackaging is integrated with the initial processing operations in the sense that it is done only to keep the production lines busy during a lapse in the flow of fresh vegetables. At least in terms of economics, moreover, such repackaging is a "necessary" part of the overall operation of the plant during the harvest season, since it is necessary for an economic utilization of the work force kept on hand to handle the incoming flow of fresh vegetables. For those reasons, the storage of some of the vegetables for a few hours before their final packaging can properly be viewed as being, not a "break" in the processing operations, but simply a part of the mechanics of achieving an efficient utilization of the production line—*i.e.*, with some vegetables being set aside momentarily when the production lines are overloaded and being returned when there is a lull in the intake of fresh vegetables. So viewed, the final packaging can be said to be a part of a "continuous series of operations" beginning with the fresh vegetables and hence a part of their "first processing" within the meaning of the regulations (see Pet. Br. 22). It may be that the difference between in-seasonal and post-seasonal repackaging in this respect is only one of degree (though there is also the difference that during the season initial processing and freezing is being simultaneously carried on), but even so it is a very real difference. More fundamentally, the scope of "first processing" cannot be determined by mechanical tests but requires a pragmatic judgment of the

relationship of the several steps to each other in the light of the underlying purposes of the exemption. And on that approach, there is no logical difficulty, on the facts supposed, in treating the incidental in-seasonal repackaging as a part of "first processing" even though the post-seasonal repackaging is not.

Alternatively, even if the in-seasonal repackaging were not itself to be deemed a part of "first processing", it could be said that it is a merely incidental activity that should not defeat the exemptions which would otherwise be available. That is, during the season Oregon is undeniably *primarily* engaged in first processing, and its concurrent performance of incidental repackaging means at most only that it is not engaged *exclusively* in first processing. It is true that normally an employer must be engaged virtually exclusively in first processing to qualify for the exemptions (unless the several activities are separable so that the exemptions can be separately applied). That principle, however, is not a rigid one and does not mean that any non-qualifying activity, no matter how *de minimis* in relation to the qualifying activities, necessarily bars the exemptions. And, in determining how substantial the "side" activities must be to defeat the exemptions, the test should be a qualitative as well as a quantitative one. That is, not only the extent of the activities, but also such factors as the reasons for their being performed and the effect of their performance on the use of overtime, should be taken into account. On the facts supposed, where the in-seasonal repackaging is done only to make use of otherwise idle labor and does not increase or affect

the use of overtime, even a relatively substantial amount of incidental repackaging during the season might not warrant denial of the exemptions.

Both of the foregoing bases for allowing the exemptions in the circumstances supposed rest on considerations that are peculiar to repackaging that is incidental to the concurrent processing of fresh vegetables being received during the harvest season. Whichever formulation should be finally adopted by the Administrator, therefore, would not affect the sole question in issue here—*i.e.*, Oregon's right to the exemptions when, after the season ends, it is engaged exclusively in the repackaging of bulk-stored vegetables and is employing overtime solely for that purpose.

III

Question: If the petitioner's position in this respect is reflected or clarified in any administrative rulings, will you please submit same.

As stated in our main brief, the regulations and rulings leave no doubt of the Administrator's position that repackaging by itself (*e.g.*, where, as in the case of Oregon's post-seasonal repackaging, it is the sole operation being carried on) is not exempt as first processing.[6] On the quite different question posed by the Court, however—the effect of repacking performed during the season incidental to the concurrent processing of fresh vegetables—the Adminis-

[6] Pet. Br. 22-23. See also Interpretive Bulletin No. 14 (1940), 35 W.H.M. 351, 359, stating that "repacking or recanning fruits and vegetables" are not exempt operations because "they are not performed on fresh fruits or vegetables."

trator has not, as we have noted, had occasion to adopt a formal position. The informal views on that question stated above are not, therefore, reflected in any administrative rulings.

Respectfully submitted.

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Solicitor General.

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